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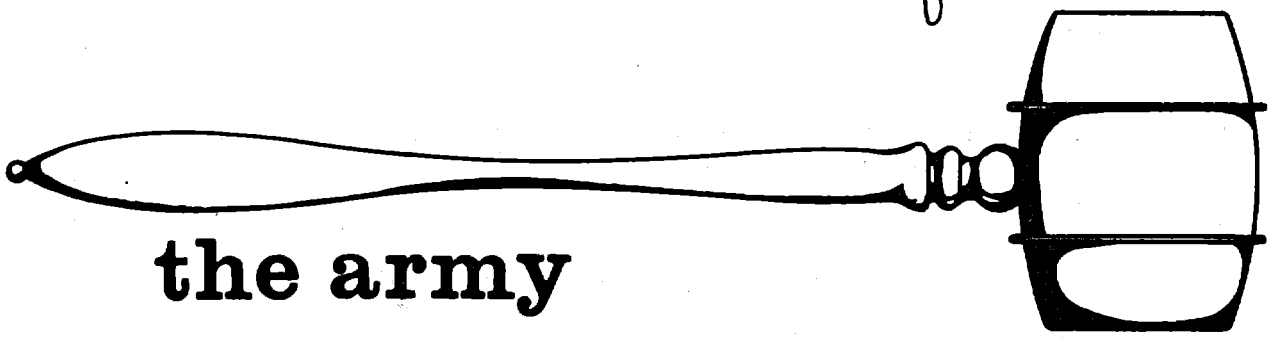

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Article 31, UCMJ and Compelled Handwriting and Voice Exemplars

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Introduction

Article 31, Uniform Code of Military Justice (UCMJ),[1] has long been perceived as the codal provision that most distinctly sets the military criminal justice system apart from its civilian counterpart. That perception may be less valid today than it once was because the two systems have moved closer together over the years in their respective views of which protections should be afforded a person in the self-incrimination arena. Nevertheless, since the 1950s, the U.S. Court of

[1]Uniform Code of Military Justice, art. 31, 10 U.S.C. § 831 (1976), [hereinafter cited as U.C.M.J.] provides in pertinent part:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial . . . .

(d) No statement obtained from any person in violation of this Article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Military Appeals (USCMA) has consistently ruled in a variety of situations that Article 31 offers a suspect broader protection than the Fifth Amendment of the United States Constitution.[2]

Historically, the USCMA has consistently applied the broader restrictions of Article 31 to compelled handwriting and voice specimens. Recently, however, the court has apparently begun a reexamination of the article's protections in *United States v. Armstrong*[3] and *United States v. Lloyd*.[4] Some commentators have contended that *Armstrong* and *Lloyd* have erased all Article 31 prohibitions relating to handwriting and voice exemplars; in this author's opinion this interpretation is inaccurate. Although *Armstrong* and *Lloyd* have clearly limited the scope of the article, these decisions have left intact its prohibitions against compelled handwriting and voice evidence.

In order to place the *Armstrong* and *Lloyd* decisions in perspective, this article will consider their implications for involuntary handwriting and voice evidence in the light of prior case law. It will also briefly review other evaluations of *Armstrong* and *Lloyd* and describe their current implementation during the pretrial and trial phases of the military criminal justice process.

[2]No person . . . shall be compelled in any criminal case to be a witness against himself . . . U.S. Const. Amend. V.

[3]9 M.J. 374 (C.M.A. 1980).

[4]10 M.J. 172 (C.M.A. 1981).

Case Precedent Prior to *Armstrong/Lloyd*

The Court of Military Appeals first considered the application of Article 31 to compelled handwriting and voice identification evidence in three cases decided only two years after the UCMJ took effect. In *United States v. Rosato*,[5] *United States v. Eggers*,[6] and *United States v. Greer*,[7] all unanimous decisions issued in 1953, the court ruled that both Article 31(a) and the Fifth Amendment protect an accused against being compelled by military orders to create handwriting samples or speak for voice identification.[8]

At the heart of each case was the relationship between Article 31(a) and military orders. In *Rosato*, the accused was ordered to copy the alphabet; he refused on advice of counsel and was prosecuted for willful disobedience. In *Eggers*, the accused created handwriting specimens only after he was ordered to do so. At trial in *Greer*, the law officer ordered the accused to read aloud for purposes of an in-court voice identification. The court had to determine whether these orders, which required the servicemember to do something affirmative to create evidence, contravened Article 31(a).

[5]3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

[6]3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

[7]3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

[8]3 U.S.C.M.A. at 147, 11 C.M.R. at 147 (*Rosato*); 3 U.S.C.M.A. at 198, 11 C.M.R. at 198 (*Eggers*); 3 U.S.C.M.A. at 579, 13 C.M.R. at 135 (*Greer*).

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The Manual for Courts-Martial, 1951, provided another important element. Paragraph 150*b* specifically authorized the involuntary taking of handwriting and voice exemplars.[9] Chief Judge Quinn pointed out in *Greer* that paragraph 150*b* was based on the testimonial compulsion doctrine enunciated by the United States Supreme Court in a 1910 decision, *Holt v. United States*.[10] *Holt* limited Fifth Amendment protections to those instances in which "physical or moral compulsion" was used to extort "communications" from a person.[11] Paragraph 150*b*, therefore, confronted the court with the question of whether the testimonial compulsion doctrine could be properly applied to compelled handwriting and voice exemplars.

Chief Judge Quinn, who wrote the court's opinion in *Rosato*, and Judge Brosman, the author of *Eggers*, carefully considered the available authority. Since there was no specific guidance in the legislative history of Article 31 or in federal Fifth Amendment decisions, the court based its *Rosato* decision on Dean Wigmore's evidence code and several federal circuit decisions which were indirectly applicable.[12] In *Eggers*, the court again relied on these authorities and on an opinion of the Supreme Court of the Phillipine Islands, the only decision directly on point.[13]

The military orders at issue in *Rosato*, *Eggers*, and *Greer*, the court concluded, contravened Article 31(a) and the Fifth Amendment for the same basic reason. As Chief Judge Quinn indicated in *Rosato*, when officials order a person to compose handwriting samples to be used as evidence against him, they are compelling that person to incriminate himself through his own "affirmative conscious act."[14] Unlike the neutral act of exhibiting parts of one's body, the creation of a handwriting specimen involves "a conscious exercise of both mind and body."[15] Similarly, in *Eggers*, Judge Brosman described the distinction as the difference between "passive cooperation" and "active participation in the production of an incriminating document not theretofore in existence."[16]

Finally, while stating that it had no objection to the testimonial compulsion doctrine as a principle, the court rejected its application to compelled handwriting and voice exemplars. First in *Rosato*,[17] and later in *Eggers*[18] and *Greer*,[19] the court ruled that the compulsory provisions of paragraph 150*b* were in direct conflict with Article 31.

In these early cases, the court did not directly confront the question of whether the constitutional and statutory protections differed in scope. Despite the minimal guidance available to them, the judges had little difficulty concluding that both the Fifth Amendment and Article 31 provided the protections in question. On the other hand, there were some distinctions in the opinions of Chief Judge Quinn and Judge Brosman which foreshadowed later differences over the general scope of Article 31.

In *Eggers*, Judge Brosman stated emphatically that Congress intended Article 31(a) to embody "no more and no less" than the Fifth Amendment protection against self-incrimination,[20] a view re-

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[9] Manual for Courts-Martial, United States, 1951, para. 150*b* stated in pertinent part:

> The prohibition against compelling a person to give evidence against himself relates only to the use of compulsion in obtaining from him a verbal or other communication in which he expresses his knowledge of a matter and does not forbid compelling him to exhibit his body or other physical characteristics as evidence when such evidence is material. Consequently, it is not a violation of the prohibition to order a person (including an accused) . . . to make a sample of his handwriting, [or] to utter words for the purpose of voice identification.

[10] 3 U.S.C.M.A. at 578, 13 C.M.R. at 134 (citing Holt v. United States, 218 U.S. 245 (1910)).

[11] In *Holt*, the Court ruled that compelling a prisoner to put on a blouse for purposes of identification did not violate the Fifth Amendment. *Id.* at 252-53.

[12] 3 U.S.C.M.A. at 197, 11 C.M.R. at 197.

[13] *Id.* at 196, 11 C.M.R. at 196 (citing Beltran v. Samson & Jose, 53 Phil. Is. 570 (1952)).

[14] 3 U.S.C.M.A. at 147, 11 C.M.R. at 147.

[15] *Id.*

[16] 3 U.S.C.M.A. at 198, 11 C.M.R. at 198.

[17] 3 U.S.C.M.A. at 146-47, 11 C.M.R. at 147.

[18] 3 U.S.C.M.A. at 198, 11 C.M.R. at 198.

[19] 3 U.S.C.M.A. at 579, 13 C.M.R. at 135.

[20] 3 U.S.C.M.A. at 195, 11 C.M.R. at 195.

vived in 1980 by Chief Judge Everett in *United States v. Armstrong*.[21] On the other hand, Chief Judge Quinn, who wrote both *Rosato* and *Greer* and who later became a major proponent of the view that Congress intended Article 31 to be broader than the Fifth Amendment, did not use restrictive language; he clearly favored a broader interpretation of the article.[22]

In later cases, the conflict between these different interpretations became more evident when the court considered the application of Articles 31(b) and (d) to handwriting and voice evidence. In *United States v. Ball*[23] and *United States v. McGriff*,[24] both 1955 decisions, the court held the Article 31(b) warnings are not required before requesting a person to provide handwriting exemplars, because these exemplars do not amount to a "statement," nor are they the product of "interrogation" within the meaning of Article 31(b).[25]

In *Ball*, Judge Brosman, with Judge Latimer concurring, clearly set forth his view that Articles 31(b) and (d) are not as broad as Article 31(a) and apply under different, more limited circumstances. The warning requirement of Article 31(b), he wrote, "is not a constitutional requirement . . . . [T]he necessity for a warning is not coextensive with the privilege against self-incrimination." He added that the words "statement" in Articles 31(b) and (d) and "interrogate" in Article 31(b) "distinctly signify language, or its equivalent, which has relevance . . . because of the content . . . and not because of its manner of utterance or the like."[26]

Chief Judge Quinn, who concurred in the result in *Ball*,[27] objected to this restrictive interpretation of Article 31. He contended that the court should interpret the separate clauses of the article in a complementary fashion "as a whole" and should not "cut [them] up into little pieces."[28] In his view, if an investigator asked an accused for a handwriting specimen, the request constituted an "interrogation" within Article 31(b) because "it is an attempt to elicit information."[29] The accused's response was a "statement" within Articles 31(b) and (d) whether it was a "detailed narrative or simply his signature."[30] He supported a broad rule that "handwriting specimens cannot be obtained from an accused without first warning him in general of his [Article 31 rights]."[31]

Ball and *McGriff* reflect Judge Brosman's ascendant view that a handwriting specimen was inadmissible only when obtained under some form of compulsion from an accused or suspect. Neither the fact that the evidence was obtained by an unlawful inducement nor the failure to provide the warnings called for by Article 31(b) rendered the specimen inadmissible.

Within three years of *Ball* and *McGriff*, however, Chief Judge Quinn's approach became the dominant force in the interpretation of Article 31 by the court. Judge Homer Ferguson, who replaced Judge Brosman in 1956, soon became an ally of Chief Judge Quinn on questions involving the application of Article 31 to handwriting and voice specimens.

In 1958 the court expressly overruled *Ball* and *McGriff*. In *United States v. Minnifield*[32] the court held that an accused's handwriting exemplar *is* a "statement" within the meaning of Articles 31(b) and (d). Before that evidence can be admitted against the accused, the prosecution must show that government agents complied with all the provisions of Article 31.[33]

Most importantly, in *Minnifield*, Judge Ferguson asserted in his majority opinion, with Chief

[21] 9 M.J. 374 (C.M.A. 1980).

[22] 3 U.S.C.M.A. at 146, 11 C.M.R. at 146 (*Rosato*); 3 U.S.C.M.A. at 578-79, 13 C.M.R. at 134-35 (*Greer*).

[23] 6 U.S.C.M.A. 100, 19 C.M.R. 226 (1955).

[24] 6 U.S.C.M.A. 143, 19 C.M.R. 269 (1955).

[25] 6 U.S.C.M.A. at 104, 19 C.M.R. at 230 (*Ball*); 6 U.S.C.M.A. at 145, 19 C.M.R. at 271-72 (*McGriff*).

[26] 6 U.S.C.M.A. at 104, 19 C.M.R. at 230.

[27] *Id.* at 105, 19 C.M.R. at 231 (Quinn, C.J., concurring).

[28] *Id.* at 106, 19 C.M.R. at 232 (Quinn, C.J., concurring).

[29] *Id.* at 105, 19 C.M.R. at 231 (Quinn, C.J., concurring).

[30] *Id.* at 106, 19 C.M.R. at 232 (Quinn, C.J., concurring).

[31] *Id.*

[32] 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958).

[33] *Id.* at 378, 26 C.M.R. at 158-59.

Judge Quinn concurring, that Article 31 "is wider in scope than the Fifth Amendment."[34] Underlying this more expansive general interpretation of Article 31 was the court's apparent conclusion that Congress had deliberately fashioned a broader statutory protection in order to control the subtle coercive pressures found in military society.[35] *Minnifield* was not the court's first articulation of this approach. It reflected similar interpretations of Article 31 made in two earlier cases, *United States v. Jordan*[36] and *United States v. Musguire*.[37] Together with *Minnifield*, these decisions marked a distinct departure from Judge Brosman's more restrictive interpretation of the article.

Judge Ferguson applied this expansive view in two key ways in *Minnifield*. First, he emphasized the policy considerations implicit in Article 31's broader protections. He concluded that *Ball* and *McGriff* gave the statute "the most restricted interpretation possible," and thereby frustrated its underlying policy.[38] The purpose of an Article 31 warning, he suggested, is to protect the constitutional and statutory guarantees against compulsory self-incrimination.[39] In his and Chief Judge Quinn's view, a broad and enlightened construction of Article 31, rather than a narrow and grudging one, would insure the attainment of this purpose.[40]

Second, Judge Ferguson's approach was clearly reflected in his interpretation of the specific language of the statute itself. To exclude handwriting exemplars from the thrust of Articles 31(b) and (d) because they do not literally constitute "statements," as *Ball* and *McGriff* did, represented a "flimsy and artificial technicality which isolates a single word from an entire concept," he wrote.[41] If the purpose of an Article 31 warning is to avoid impairment of the constitutional guarantee against compulsory self-incrimination, then "there can exist little difference between condemning one's self by mouth and condemning one's self by hand." This is especially so, he added, when the greater breadth of Article 31 is considered.[42]

It is important to note that in *United States v. Jordan*,[43] Judge Ferguson also commented specifically on the scope of Article 31(a). He pointed out that like the first clause of Article 31(a) which states "no person subject to this chapter may compel any person to incriminate himself," the offense of violation of a lawful command of a superior officer has no counterpart in civilian practice. In his opinion, the first clause of Article 31(a) has a broader scope than the language of the Fifth Amendment that no person shall be compelled "to be a witness against himself." Article 31(a)'s language, he stated, is "not a limitation to only testimonial utterances, it is all inclusive."[44]

Guidance from the Supreme Court

Minnifield remained undisturbed for ten years. In 1967, however, the United States Supreme Court ruled in two decisions, *United States v.*

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[34] *Id.* at 378, 26 C.M.R. at 158 (quoting United States v. Musguire, 9 U.S.C.M.A. 67, 68, 25 C.M.R. 329, 330 (1958)).

[35] 9 U.S.C.M.A. at 68, 25 C.M.R. at 330. In *Musguire*, Chief Judge Quinn, with Judge Ferguson concurring, stated that "Article 31 is wider in scope than the Fifth Amendment . . . [It is] intended to protect persons accused or suspected of crime who might otherwise be at a disadvantage because of the military rule of obedience to proper authority." *Id. Musguire* marks one of the earliest instances when the court identified the subtle pressures surrounding the superior-subordinate relationship in military society as the main reason for the greater protection provided by Article 31. *Cf.* United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982).

[36] 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

[37] 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958).

[38] 9 U.S.C.M.A. at 378, 26 C.M.R. at 158.

[39] *Id.*

[40] *Id.* at 379, 26 C.M.R. at 159. In *Minnifield*, although the accused was given a proper Article 31 rights advisement, he contended that the handwriting specimen was obtained by unlawful inducement. Judge Ferguson seized the opportunity to cast an opinion in very broad terms. Judge Latimer, who, with Judge Brosman, formed the majority in *Ball*, dissented in *Minnifield*. He deplored the overruling of *Ball*, and specifically decried the court's abandonment of the distinction between handwriting exemplars and confessions. *Id.* at 379-80, 26 C.M.R. at 159-60 (Latimer, J., dissenting).

[41] 9 U.S.C.M.A. at 378, 26 C.M.R. at 158-59.

[42] *Id.* at 378, 26 C.M.R. at 158.

[43] 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

[44] *Id.* at 456, 22 C.M.R. at 246 (Ferguson, J., concurring). *See also* J. Larkin & M. Munster, Military Evidence 310-11 (1959).

Wade[45] and *United States v. Gilbert*,[46] that the production of handwriting and voice exemplars involves words or conduct which "lack testimonial characteristics" and so is not protected by the Fifth Amendment.[47] Nevertheless, when the Court of Military Appeals reconsidered its previous decisions soon thereafter, it concluded that *Wade* and *Gilbert* were not controlling because Article 31 is wider in scope than the Fifth Amendment. In *United States v. White*[48] and *United States v. Mewborn*,[49] Chief Judge Quinn, writing for a unanimous court, specifically adhered to the prior law set forth in *Minnifield* and Greer.[50] In *White*, he emphasized that the court was interpreting a statutory right which is broader than the Fifth Amendment. Nothing in *Minnifield*, he pointed out, is inconsistent with the Supreme Court's interpretation of the constitutional protection. Therefore, an accused must be apprised of his rights under Article 31 "before he can be asked for samples of his handwriting."[51] Again, in *Mewborn*, he stressed the "broader protections accorded an accused by Article 31" and identified this principle as the primary basis for the *Greer* decision. Citing *White* as authority, he stated that "before an accused is asked to speak for voice identification he must first be informed he has the right to say nothing."[52] The *Mewborn* ruling thus actually went beyond *Greer* and applied Article 31(b) to voice identification evidence.

Therefore, it was settled law by 1968 that Article 31 afforded broad protections:

1. Article 31(a) prohibited compelling a soldier by military orders to create handwriting specimens or to speak for voice identification;

2. Article 31(b) required that an accused or suspect be given proper warnings before he could be asked for samples of his handwriting or asked to speak for voice identification; and

3. Article 31(d) prohibited receipt in evidence of any handwriting or voice specimens obtained through coercion, unlawful influence, or unlawful inducement.[53]

Since that time, the Court of Military Appeals has periodically reaffirmed its adherence to the principle that Article 31 has a broader scope than the Fifth Amendment.[54] Judge Brosman's restrictive view was completely swept from the field, until its resurrection by Chief Judge Everett in *United States v. Armstrong*.[55]

United States v. Armstrong

United States v. Armstrong involved the admissibility of test results of a blood specimen involuntarily taken from an accused. In his lead opinion, however, Chief Judge Everett conducted a broad analysis of the legislative and judicial history defining the scope of Article 31. In dictum, he set forth his specific views concerning handwriting and voice specimens.

Chief Judge Everett concluded that Article 31 does not apply to the extraction of bodily fluids, such as blood.[56] He based this conclusion on two premises. First, adopting Judge Brosman's view from the *Eggers* decision,[57] he stated that Congress intended Article 31 to be "co-extensive" with the Fifth Amendment.[58] Second, following the lead of the Supreme Court,[59] he selected the doctrine of testimonial compulsion as his primary aid for determining the precise scope of Article 31 un-

[45] 388 U.S. 218 (1967) (voice identification).

[46] 388 U.S. 263 (1967) (handwriting exemplars).

[47] 388 U.S. at 222-23 (*Wade*); 388 U.S. at 266-67 (*Gilbert*).

[48] 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

[49] 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

[50] 17 U.S.C.M.A. at 216, 38 C.M.R. at 14-15 (*White*); 17 U.S.C.M.A. at 436, 38 C.M.R. at 234 (*Mewborn*).

[51] 17 U.S.C.M.A. at 216, 38 C.M.R. at 14.

[52] 17 U.S.C.M.A. at 434, 38 C.M.R. at 232.

[53] *See* text accompanying notes 5-22 *supra*.

[54] *See, e.g.*, United States v. Lewis, 12 M.J. 205 (C.M.A. 1982); United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974).

[55] 9 M.J. 374 (C.M.A. 1980).

[56] *Id.* at 376-77.

[57] *See* text accompanying notes 20-21 *supra*.

[58] 9 M.J. at 383.

[59] *Id.* at 377-79.

der particular circumstances.[60] Article 31 should not apply, he contended, to words and conduct which "lack testimonial characteristics."[61] Within this analytical framework, he specifically found that the extraction of bodily fluids does not trigger Article 31(b) warning requirements because the act of giving up bodily fluids does not amount to a communication within the article.[62] Nor does Article 31(a) apply, he wrote, because there is no "testimonial compulsion" involved in obtaining such evidence.[63]

The Chief Judge acknowledged that in past decisions the court had rejected both the view that Article 31 and the Fifth Amendment are equal in scope and the doctrine of testimonial compulsion.[64] He nonetheless sought to persuade the other judges that Congress had really intended the court to apply the more restrictive interpretation of Article 31 embodied in these principles.[65] Using broad language, he also attempted to carry the court far beyond the specific facts of the case. He contended in dictum, for example, that Article 31 should not be held to apply to the taking of handwriting and voice exemplars.[66]

His efforts to convince the court did not succeed. In their concurring opinion, Judges Cook and Fletcher expressly rejected his argument.[67] Although they agreed generally that Article 31 does not apply to the extraction of bodily fluids or the taking of fingerprints, they refused to go further. Instead, they expressed approval for the rationale of the Analysis of Military Rule of Evidence 301, that Article 31 does not apply to a taking of bodily fluids because it "does not involve the creation of evidence."[68] They also specifically disassociated themselves from the restrictive interpretation of Article 31(a) expressed by Chief Judge Everett. Taking issue with his contention that Congress intended Article 31 and the Fifth Amendment to be "co-extensive," they reaffirmed their support for the view that Article 31(a) "has a broader sweep than the Fifth Amendment."[69] Article 31(a), they stated, "protects an accused or suspect against being compelled to provide samples of his handwriting and being compelled to speak for voice identification," actions which they apparently viewed as involving the "creation of evidence."[70] Nothing in *Armstrong*, they concluded, required the court to reexamine this "settled construction of Article 31."

United States v. Lloyd

Less than 80 days after its decision in *Armstrong*, the court decided *United States v. Lloyd*.[72] Although *Lloyd* clarified the court's position only slightly, the decision is relied upon by some commentators as proof that the court had finally laid the handwriting issue to rest.

Lloyd involved a request that the accused, who was not a suspect at the time, hand over his current military identification card to a government investigator so that his signature thereon could be used for comparison purposes.[73] In an opinion of the court authored by Chief Judge Everett, with Judge Fletcher concurring without comment, the court rejected a contention that the agent should have given an Article 31(b) warning before making the request.[74] Going beyond the specific facts of the case, the Chief Judge wrote that, under the *Armstrong* rationale, there is "no reason to require an Article 31(b) warning before requesting a suspect to give a handwriting sample or, as here, to produce a document containing his signature or handwriting to be used for comparison purposes.[75]

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[60] *Id.* at 378.

[61] *Id.* at 377-78.

[62] *Id.* at 379.

[63] *Id.* at 380.

[64] *Id.* at 377.

[65] *Id.* at 380-83.

[66] *Id.* at 376-79.

[67] *Id.* at 384 (Cook & Fletcher, JJ., concurring).

[68] *Id.* (citing Analysis to Mil. R. Evid. 301, *reprinted in* Manual for Courts-Martial, United States, 1969 (Rev. ed.), App. 18 (C.3 1980).

[69] *Id.* at 384 (Cook & Fletcher, JJ., concurring).

[70] *Id.*

[71] *Id.*

[72] 10 M.J. 172 (C.M.A. 1981).

[73] *Id.* at 173.

[74] *Id.* at 174-75.

[75] *Id.* at 175.

Since *Lloyd's* scope is limited, the decision must be read carefully in light of its facts. Most significantly, the case involved only a *request* and did not touch upon the involuntary creation of evidence.[76] For this reason, Chief Judge Everett considered only the application of Article 31(b); the scope of Article 31(a) was not an issue under the facts of the case. Moreover, Judge Cook concurred only in the result. In his view, the court did not need to reexamine a suspect's right under Article 31(b) to refuse a request to provide exemplars of his handwriting. He no doubt concluded that, under its facts, *Lloyd* simply did not present an Article 31(b) issue because the accused was not a suspect at the time of the agent's request. As another basis for disagreeing with the court's opinion, Judge Cook referred to his concurring opinion in *Armstrong*, thereby reemphasizing his unwillingness to accept the "co-extensive" rationale.[77]

Judged against the foregoing analysis, the *Lloyd* decision does little to resolve the differences of opinion among the judges concerning the reach of Article 31, particularly Article 31(a). Although Judge Fletcher's concurrence raises some question as to just where he stands, there is no indication he had abandoned the position he expressed only 77 days earlier in *Armstrong*. Although he had the opportunity to join formally with Judge Cook's reservations, Judge Fletcher apparently chose not to do so. It would be imprudent, however, to interpret his concurrence as a signal that he had suddenly embraced Chief Judge Everett's "co-extensive" theory. Concurrences must be read in light of the facts of the case; certainly the facts in *Lloyd* fell far short of presenting the court with a clear issue concerning compelled handwriting exemplars.[78]

Interpretations of *Armstrong/Lloyd*

Commentators who have discussed *Armstrong* and *Lloyd* have, in this author's view, ignored or glossed over the differences of opinion found amongst the judges in these decisions. Instead, the commentary has focused almost exclusively on Chief Judge Everett's individual interpretation of Article 31, sometimes without properly identifying his view as that of only one of the three judges.

The May 1981 issue of *The Army Lawyer* provides an example. The author of the lead article,[79] when describing *Armstrong's* discussion of Article 31(a), incautiously attributed to "the court" the general statement that there was no congressional intent to extend Article 31(a) protections beyond evidence of a testimonial or communicative nature.[80] The author further assigned to the court as a whole the general view that Congress intended in Article 31(a) to provide only a protection which paralleled the constitutional privilege. Never mentioned is that, in *Armstrong*, the Chief Judge was the sole proponent of the "co-extensive" theory.[81] Further, the article is silent as to Judges Cook and Fletcher's limited concurrence and their disagreement with the Chief Judge's analysis of Article 31(a).[82] Indeed, the clear impression left by the author's comments is that there was unanimity in the view that Article 31(a) and the Fifth Amendment are co-extensive.[83]

Similarly, the editors of the *Military Rules of Evidence Manual*, when commenting on the *Armstrong* decision, attributed to "the court" the con-

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[76] *Id.* at 173. *Lloyd* can be read to restrict the prior case law insofar as those cases require an Article 31(b) warning before an accused or suspect is *requested*, rather than *compelled*, to provide a handwriting sample. *Compare* United States v. Lloyd, 10 M.J. 172 (C.M.A. 1981), *with* United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

[77] 10 M.J. at 175 (Cook, J., concurring).

[78] The danger in placing undue emphasis on straight concurrences is illustrated by the recent case of United States v. Lewis, 12 M.J. 205 (C.M.A. 1982), which also involved the application of Article 31. There Judge Cook, writing for the court, states in dictum: "These provisions [Article 31] accord an accused even broader protection than the Fifth Amendment." *Id.* at 207, Chief Judge Everett concurred without comment, yet it is unlikely he supports the stated view.

[79] Green, *Article 31 and the Involuntary Seizure of Body Fluids. An Inquiry into the Vitality of United States v. Ruiz*, The Army Lawyer, May 1981, at 1. Lieutenant Colonel Green's article dealt primarily with body fluids and was not directed specifically at handwriting or voice exemplars.

[80] *Id.* at 5.

[81] *See* text accompanying notes 56-71 *supra*.

[82] *See* text accompanying notes 67-71 *supra*.

[83] Green, *supra* note 79, at 5 ("Any doubts about the new and restricted interpretation of the protection afforded by Article 31 was *completely* dispelled in *United States v. Lloyd*.") (Emphasis added).

clusion that Congress intended the statutory protection to be co-extensive with the Fifth Amendment privilege.[84] The authors clearly overreached the limits of *Lloyd* in stating that the case reversed a line of military decisions which had interpreted Article 31 in a broad fashion and that it eliminated Article 31 protections in all handwriting and voice exemplar situations.[85] Other commentators, although, perhaps, more discriminating than those noted above have nevertheless focused almost exclusively on Chief Judge Everett's opinions and have made little or no effort to analyze the reservations of the other judges in the light of past case law.[86]

Substantive differences aside, the commentators seem to have confused the distinction between the tendency of the law and its actual current state. Those who encounter these issues are understandably and properly concerned about where the law is going and what it will become. On the other hand, practitioners in the field, in their advice to clients and commanders, must focus largely on what the law *is* today. The simple fact remains that, whatever the future may bring, the Court of Military Appeals has not yet rejected the long-held view that Article 31 applies to compelled handwriting and voice exemplars.

Prosecution and Defense Strategies

No matter how they are viewed, *Armstrong* and *Lloyd* do raise the question of whether the court will continue to protect soldiers from being compelled to provide handwriting or voice samples. Will Judges Cook and Fletcher continue to adhere to thirty years of precedent or are they, as one commentator puts it, "merely waiting until the factually correct case is presented so they may join the Chief Judge"?[87]

At least two agencies with a direct interest in the impact of this issue on investigative proceedings have already developed strategies for future cases. Soon after *Armstrong* and *Lloyd* appeared, the legal office for the Army's Criminal Investigation Command (CID) advised investigators to obtain handwriting evidence by military orders if necessary. According to this advice, if a soldier refuses a request to provide or create handwriting samples, then either the agent or the soldier's commander should order him to provide them "using [his] customary and regular writing style." If the servicemember still refuses to comply, he would be prosecuted for failure to obey a lawful order.[88]

From the defense viewpoint, the CID's advice is founded on what it hopes the law will become, not what it now is. Based on case precedent and the reservations expressed by Judge Cook in *Armstrong* and *Lloyd*,[89] and Judge Fletcher in *Armstrong*,[90] the U.S. Army Trial Defense Service (USATDS) has advised its counsel to continue to assert Article 31(a), (b), and (d) protections in cases in which the client is required to create evidence by writing or speaking.[91] According to USATDS, when the client is given an order, there are two basic options available to him:

1. He can comply with the order but he should assure the record shows he was compelled to do so; or

2. He can refuse to comply with the order but should make sure that the record shows that he acted pursuant to Article 31 as interpreted by the USCMA.

Regardless of which option is used, USATDS advises that the servicemember should clearly establish the legal basis for his action. For this purpose, an explanatory statement signed by the

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[84]S. Saltzburg, L. Schinasi, & D. Schleuter, Military Rules of Evidence Manual 54 (1981).

[85]*Id.*

[86]Lause, *The Court of Military Appeals at a Glance*, The Army Lawyer, May 1981, at 20-21; Ross, *Case Notes*, The Detective 30-31 (Spring/Summer 1981) (*The Detective* is published by the U.S. Army Criminal Investigations Command).

[87]Lause, *supra* note 86, at 21.

[88]Ross, *supra* note 86, at 21. It is further suggested that evidence of a refusal might also be admissible to prove consciousness of guilt concerning the underlying offense under investigation. *Id.*

[89]9 M.J. at 384 (Cook & Fletcher, JJ., concurring) (*Armstrong*); 10 M.J. at 175 (Cook, J., concurring) (*Lloyd*).

[90]9 M.J. at 384 (Cook & Fletcher, JJ., concurring).

[91]Special Training Memorandum, U.S. Army Trial Defense Service, 15 Dec. 1981.

client and delivered to the authority who issued the order is suggested.[92] The latter option, refusal, involves the risk of an additional charge. The accused or suspect soldier is not insulated simply because he acted pursuant to a defense counsel's advice. USATDS therefore advises its attorneys to confer closely with their supervisors before counseling that course of action.[93] Often, however, the defense counsel's natural cautionary approach is short-circuited by events. In many of the cases brought to USATDS' attention, the soldier has refused to provide exemplars before consulting an attorney.

Conclusion

Whatever the ultimate treatment of these issues by the court, both prosecution and defense advocates must understand the differences of opinion among the USCMA judges so they can properly advise commanders and clients. Beyond that consideration and in light of the case precedent, the reservations by Judges Cook and Fletcher in *Armstrong*, and the limited scope of the *Lloyd* decision, there is no absolute certainty that the court eventually will adopt Chief Judge Everett's view toward compelled handwriting and voice specimens.

In the field, several cases involving compelled handwriting and voice samples have arisen recently. In view of the strategies developed by the CID and USATDS, we can expect the court to soon address these questions again.

[92]*Id.*

[93]*Id.*

Your Rights as a Reservist if Disabled While Performing Military Duties

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Introduction

Frequently, questions arise concerning basic rights of reservists, particularly in the area of personal injury and illness, while in the performance of various reserve duties. It is the purpose of this article to review at least some of the myriad of laws, rules, and regulations governing reservists benefit entitlements.

Injury En Route To or From IDT

Many reservists are understandably concerned about automobile accidents en route to or from their reserve center. In short, there is absolutely no entitlement to military pay and allowances or most other military benefits when a member of a reserve unit is injured or killed on his or her way to or from the Inactive Duty Training (IDT) site.[1] This would be true even if the reservist were performing a weekend drill and were injured while returning home at the end of the first day of training.[2]

However, all may not be lost. Army regulations provide that "in appropriate cases" the Veterans' Administration may provide care for reservists injured in line of duty while proceeding to or from Inactive Duty Training (IDT).[3] In this connection, the Veterans' Administration (VA) has decreed that

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[1]*See* Army Reg. No. 40-3, Medical Services—Medical, Dental, and Veterinary Care, para. 4-2a(3) (10 Oct. 1977) [hereinafter cited as AR 40-3]; Army Reg. No. 600-33, Personnel General—Line of Duty Investigations, para. 1-2b (15 Jun. 1980) [hereinafter cited as AR 600-33]; Army Reg. No. 635-40, Personnel Separations—Physical Evaluation for Retention, Retirement, or Separation, para. 8-2a(2) (15 Feb. 1980) [hereinafter cited as AR 635-40]; DAJA-AL 1974/3364, 28 Dec. 1973.

[2]*See* DAJA-AL 1979/3090, 29 Jun. 1979.

[3]Para. 4-2a(3), AR 40-3.

> [a]ny person who when authorized or required by competent authority assumes an obligation to perform active duty for training or inactive duty training and is disabled from an injury incurred while proceeding directly to or returning directly from such active duty for training or inactive duty training shall be deemed to have been on active duty for training or inactive duty training as the case may be, at the time such injury was incurred.[4]

Consequently, a reservist injured while traveling directly to or from IDT may qualify for medical care and treatment at a VA facility. Additionally, if the injury results in a total or partial disability of some lasting duration, the reservist may be entitled to VA compensation for a service connected disability or even a VA pension.[5] Accordingly, any reservist injured en route to or from IDT should consider applying for VA benefits by submitting VA Form 21-526 (1 Jan 81) to his or her local VA office. Although this form has detailed instructions for its completion on the reverse side, reference should also be made to VA IS-1-Fact Sheet as an aid in determining benefit entitlement.

Another important consideration may be the existence of individual or group accident and sickness insurance covering the reservist. While policies frequently contain a so-called "military exclusion," this exclusion may be inapplicable to injuries sustained during inactive duty training and periods of active duty or active duty for training of less than six months. Of course, reference must be made to the particular policy to determine the extent of coverage.

Injuries Incurred After Reaching IDT Training Site

Once a reservist has reached his or her IDT training site, he or she is probably covered for any injuries thereafter sustained. However, it should be emphasized that a reservist would probably be determined to be en route until he or she has actually arrived at the site where the inactive duty training is to be performed. For example, the U. S. Army Reserve Center at Hanscom Air Force Base, Bedford, Massachusetts, is located at least a half-mile inside the main gate. It would appear that any injury sustained between the main gate and the reserve center, including an injury in the parking lot, would more than likely be regarded as having been sustained en route, even though incurred while on a military installation.

In *Meister v. United States*,[6] a Navy Commander arrived at his reserve center, parked his car at the curb outside the chain link fence which bounded the center, and proceeded to walk to the center through a gate in the fence. While traversing a short sidewalk, he slipped and fell, fracturing his ankle. The point of injury was approximately one-half the distance between the gate and the door to the training hall. The Navy denied benefits, but the Court of Claims concluded that he was sufficiently under Navy control when he passed through the gate to the training center to entitle him to pay and allowances during his period of disability.[7]

Shortly thereafter, the Comptroller General was asked to rule on a number of situations involving travel to and from IDT by reservists. The *Meister* case was expressly limited to its facts and not viewed as a precedent for favorable administrative action in any other case. Also, in those cases where, for the mutual convenience of a reservist and the government, a reservist is allowed to utilize government transportation as a permissive traveler to and from the training center, there is no entitlement to pay, allowances, or other benefits for injuries sustained while in the government vehicle. Such travel, whether it is accomplished by government or private conveyance, is not a part of inactive duty training.[8]

Therefore, it would seem that a reservist must enter the reserve center before he or she will be considered to be on inactive duty training. Where the center houses more than one unit, it may be necessary to report to one's own unit within the center. For example, there may be a sign-in sheet

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[4] Veteran's Admin. Reg. No. 6032, 17 C.F.R. § 17.32(b) (1981).

[5] *See also* 38 C.F.R. § 17.62 (1981).

[6] 162 Ct. Cl. 667 (1963).

[7] *Id.* at 673.

[8] 43 Comp. Gen. 412 (1963).

just inside the door to the unit area which everyone is supposed to sign upon entering. It would seem that once a person has signed-in in this manner, whether or not then in uniform, the reservist would ordinarily be regarded as having entered upon inactive duty training and would normally remain in that status until the end of the training period.

This may not, however, be a rule without at least some exceptions. In one case, three Nebraska guardsmen reported to their IDT site in uniform and signed in. They failed to have certain equipment which they had been specifically directed to bring with them. Hence, they were ordered home by their unit commander with instructions to obtain their equipment and to return in time for a unit inspection. En route, they were involved in a serious automobile accident. The Judge Advocate General (TJAG) ruled that they were in an IDT status.[9] The Comptroller General reached a contrary conclusion, ruling that the three ceased to be in an IDT status when they left the training area.[10]

A short time thereafter, a very similar case arose when a Georgia guardsman was sent home by his first sergeant to obtain his clothing records and return to the armory. The reservist lost control of his motorcycle and had an accident, suffering a severe contusion to his right wrist. He was unable to perform his duties for approximately two months. The Comptroller General ruled that the Georgia guardsman was entitled to disability pay and allowances, distinguishing this case from the earlier one by pointing out that the Nebraska guardsmen had been ordered home to obtain equipment that they had been specifically directed to bring with them, whereas the Georgia guardsman had no prior knowledge that he was required to bring his clothing records to the drill. The Comptroller General concluded that the earlier case was not controlling and ruled that the Georgia guardsman was engaged in IDT at the time of the accident.[11]

Another area of concern arises when the unit commander has directed or authorized the use of private automobiles in connection with IDT, such as for travel to the rifle range at a nearby military post. In a 1962 TJAG opinion, benefits were denied an Army guardsman who was injured while returning from the rifle range in his own vehicle to the armory to clean his weapon. A not-in-line-of-duty determination was predicated upon the rationale that travel was not an actual part of his training.[12] More recent opinions of TJAG, the Comptroller General, and the courts suggest that a line-of-duty determination favorable to the member could be supported. Nonetheless, use of a privately-owned vehicle during IDT is a practice that should be discouraged, as it poses serious problems for both the commander and the reservist in the event of death or serious injury. Obviously, any misconduct involved in the use of privately owned vehicles, such as driving under the influence of alcohol or a frolic to the "Pink Panther" while going to or from the range, poses additional problems in any line-of-duty determination.[13]

Use of a private vehicle to go to lunch may be appropriate in some circumstances. In 1970, the Comptroller General authorized the Secretary of the Army to make a finding that an Army reservist who, while on weekend training, left his post of duty for lunch and was involved in an automobile accident that seriously injured him, was eligible for disability retirement.[14] If messing facilities are available within the unit or provided elsewhere on the installation for unit members, however, and the reservist elects for personal reasons to go off-post, it may be very difficult to support a determination for benefit entitlement. This would be especially true if the reservist were injured at a substantial distance from the reserve center while at lunch.

Suppose the reservist, after having the noon meal at the unit mess hall and still during the lunch break, engages in a friendly basketball game with some of the people from the unit in the reserve center gym and sustains a broken ankle during the game. Such injuries would probably be regarded as being within the purview of inactive

[9] DAJA-AL 1971/5107, 14 Sept. 1971.

[10] 52 Comp. Gen. 28 (1972).

[11] 54 Comp. Gen. 165 (1974).

[12] JAGA 1962/5032, 15 Sept. 1962.

[13] *See* Paras. 2-4, 2-5, AR 600-33.

[14] 49 Comp. Gen. 687 (1970).

duty training. Additionally, where a reservist has performed all of his required duties and is injured playing handball while awaiting return of a Navy flight squadron, benefits will not be denied.[15]

If the unit commander requires certain personnel to report early or remain after normal drill hours for so-called administrative time, during which period injuries are sustained, the reservist would be entitled to benefits. The same result would obtain even if administrative drills were conducted on other dates or at other times.[16]

It should be emphasized that benefit entitlement for injuries sustained while performing inactive duty training will largely be predicated upon a line-of-duty determination. In the event that an injury is sustained during inactive duty training in line-of-duty, the member is entitled to both medical and dental care and treatment in a military treatment facility. This entitlement extends beyond the period of inactive duty training, if necessary.[17] Additionally, where the member is disabled and the disability continues beyond the inactive duty training date, the reservist becomes entitled to full active duty pay and allowances and medical benefit commensurate with the regular forces.[18]

Should it be determined that the disability is or may be permanent, the reservist may be entitled to permanent or temporary retirement.[19] As a practical matter, a reservist injured in line-of-duty while engaged in inactive duty training would appear to have essentially the same entitlement to pay and allowances, medical care and treatment, and retirement on account of such disability as he or she would have had if the injury occurred during annual training (AT) or active duty training (ADT).

If the injury is determined to have been incurred not-in-line-of-duty, the member is not authorized medical care at government expense after the expiration of the training period and is not entitled to pay and allowances. Furthermore, the cost of care furnished after the expiration of the training period must be collected from the individual by the military treatment facility concerned.[20] Obviously, there is also no entitlement to disability retirement.[21] If the injuries are determined not to have been incurred in line-of-duty, application may still be made to the VA for medical care and treatment and other VA benefits. The VA would arrive at its own independent line-of-duty determination as a basis for benefit entitlement.[22]

Diseases Contracted During IDT

Basically, the reservist is not entitled to pay and allowances beyond the end of the IDT period or to disability benefits.[23] An illustration of this principle is found in a 1969 case in which a reservist on IDT was stricken with what was initially diagnosed as a "pulmonary embolism" which was determined as having resulted from an injury. Hospital expenses were paid by the government. Thereafter, there was a reoccurence of the condition and upon further examination it was found that the entire episode had resulted from "tuberculosis pluerisy," a disease. Benefits were, accordingly, denied.[24]

In a later opinion, a situation was presented where a reservist had suffered a heart attack while performing IDT. The issue was whether the condition was the result of an "injury" or "disease." The case was returned for a factual determination in light of the current medical classifications of "diseases" and "injuries."[25]

Injuries Sustained En Route To or From Annual Training

Although the laws and implementing regulations provide for benefit entitlements for injuries

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[15]43 Comp. Gen. 412 (1963).

[16]DAJA-AL 1973/3918, 14 May 1973.

[17]*See* Paras. 4-2a(3), 4-2a(4), AR 40-3.

[18]*See* Dep't of Defense, Military Pay and Allowances Entitlements Manual, Table 8-2-4 (C58, 21 Jan. 1980) [hereinafter cited as DOD Pay Manual].

[19]*See* 10 U.S.C. §§ 1204, 1205 (1976); Table 4-4, AR 635-40.

[20]Para. 4-2e, AR 40-3.

[21]*See* Table 4-4, AR 635-40.

[22]*See also* text accompanying notes 71-73 *infra*.

[23]*See* Table 4-4, AR 635-40; Table 8-2-4, DOD Pay Manual.

[24]JAGA 1969/4080, 15 Jul. 1969.

[25]DAJA-AL 1979/3856, 29 Nov. 1979.

sustained in connection with the performance of active duty when in a travel status to or from AT or ADT, the cases show that there are important distinctions to be made. For example, in one case, an Air Force reserve officer received orders placing him on active duty 6 December 1951. In November, he became hospitalized with "rheumatic fever" and remained in the civilian hospital through his active duty period. He sought pay and allowances and other benefits from and after the effective date of his orders. Benefits were denied on the basis that the officer had never achieved active duty status and the denial was sustained.[26] Similarly, an Army reservist received orders to report for ADT not later than 1000 hours on 20 July 1975. He died at home at 0100 hours on that date of a heart attack. It was ruled that he must have actually left home and have been traveling to his duty station in order to be in line-of-duty.[27]

In another case, a reservist decided to go around town to say "goodbye" to all his friends before leaving for AT and was seriously injured before departure; the injury was held to be not-in-line-of-duty. On the other hand, when an Army guardsman who had been ordered to AT was walking down the exterior steps of his house, slipped, and fell on ice causing injury, it was held to be in line-of-duty.[29] The fundamental rule set forth in that opinion is that active duty begins when the members leave their living quarters with the intention of going directly to the place where ordered to perform such duty and such status continues until they return directly from the place of duty to their home and have entered their living quarters.[30]

Airline delays and cancellations may compound the problem. For example, a reservist may depart his home in Boston, en route to AT at Charlottesville, Virginia at approximately 1315 hours by private automobile to go to Logan Airport for a 1525 flight to Washington National Airport and a connecting flight to Charlottesville in order to comply with an order to report not later than 0700 on the following day. Although Boston was experiencing a blizzard, the airlines had stated that the flight had not been cancelled and that it would depart albeit a few hours late. After traveling nearly thirty miles in a blinding storm to get to the airport, the reservist discovered that the airport was closed until 1800 hours. At approximately 1600 hours, the storm had worsened and all flights were cancelled.

The reservist was rebooked for a flight departing at 0830 the following morning and thereupon returned home, encountering treacherous driving conditions. There had been several more inches of snowfall and the roads continued to be extremely bad through the next twenty-four hours. Nevertheless, the reservist returned to Logan Airport and made the scheduled flight. The question is posed as to the eligibility of the reservist for benefit entitlements had he been injured on the trip from the airport to home following the cancellation of the flight. A strict reading of the Comptroller General opinions would lead to the conclusion that he was covered so long as he did not use the extra time to go off on some personal matter of his own so as to break the chain of traveling directly to his duty station.[31]

A slight twist to the line-of-duty question arises when a reservist is on group travel orders for AT and is authorized by the appropriate commander to elect some other form of transportation, such as POV, and is injured on the way. The usual rule has been that, since the reservist is entitled to pay and allowances and is performing travel, there is benefit entitlement, assuming no other factors, such as alcohol or drugs.[32] Even if the reservist were not entitled to be reimbursed for mileage under travel regulations, he or she could still be in line-of-duty. The decision is said to be a matter of command policy by the "appropriate commander."[33]

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[26]Heins v. United States, 149 F. Supp. 331, 334 (Ct. Cl. 1957).

[27]DAJA-AL 1975/5121, 17 Sept. 1975.

[28]JAGA 1963/4548, 28 Aug. 1963.

[29]58 Comp. Gen. 232, 234 (1979).

[30]*See* Adams v. United States, 127 Ct. Cl. 470 (1954); 36 Comp. Gen. 246 (1956).

[31]The facts of this scenario are taken from an actual trip of the author from Hingham, Massachusetts to Charlottesville, Virginia pursuant to AT orders.

[32]*See* DAJA-AL 1976/4591, 24 May 1976.

[33]*See id.*; DAJA-AL 1975/5092, 24 Nov. 1975.

Insofar as the return from annual training is concerned, there are at least three cases of interest. In the first, the reservist returned home after completion of his tour of duty, picked up his wife and family and went to visit friends 70 miles away when he was injured in a boating accident. Although he received pay and allowances for the entire day, it was held that he was not entitled to disability benefits since he reverted to his civilian status upon his arrival home and had resumed his civilian pursuits.[34] In another, rather fascinating case, an Army reservist was ordered to perform AT at Fort Drum, New York from 10-23 July 1977. On 22 July, the member returned to his reserve center. On the last day of his tour, the 23rd, after working at the center all day, he returned home at approximately 1930 hours. At 2200 hours, he was shot near his home by another reservist. Since the injury occurred approximately two and one-half hours after he had returned home and had reverted to his civilian status, all benefits were denied.[35]

In a more recent case, a reservist ordered to ADT arrived home at 1430 hours after having completed his tour of duty. He stayed there a short while and then drove off, only to be involved in an auto accident about 1530. His injuries were determined to have been sustained not in line-of-duty and benefits were denied. The denial was affirmed on the basis that, once a member has arrived home, he is no longer in an active duty status.[36]

Injury or Disease Sustained While on Annual Training

A reservist on active duty or active duty training, with or without pay, who is injured in line-of-duty becomes entitled to full pay and allowances commencing on the day of disability as determined by the particular service medical authorities.[37] Pay and allowances terminate when proper authority determines that the member has recovered so as to perform normal military duties. It should be noted, however, that attendance at unit training assemblies or performance of limited or restricted duties does not by itself constitute restoration to normal military duties.[38]

Pay and allowances also terminate on retirement, separation for physical disability, or discharge from the member's reserve component, or on the day of release from the hospital plus authorized travel time if the member is fit for active duty.[39] In the event that the injury is determined not to be in line-of-duty, all pay and allowances terminate on the expiration of the period of annual training.[40] (See para. 80254b(4), DOD Pay Manual and para. 1-23, AR 135-200, (Change 7, dtd 15 Jan. 1982).

If a member is disabled on AT or ADT due to disease contracted in line-of-duty, he or she is entitled to full pay and allowances while hospitalized, but not for more than six months after the end of the prescribed tour of duty or training. Pay and allowances become the responsibility of the military treatment facility commander. If a reservist is hospitalized for more than six months, entitlement is limited to subsistance only. In the event a disease is contracted not in line-of-duty, all pay and allowances terminate upon the expiration of the tour of duty.[41]

When a reservist is disabled due to disease or injury in line-of-duty during a period of training, he or she must consent, in writing, to being retained in a patient status beyond the termination date of the AT or ADT orders. The period of training is *not* extended and the patient is not in the status of being on active duty. Pay and allowances become the responsibility of the military treatment facility commander.[42]

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[34] 44 Comp. Gen. 408 (1965).

[35] DAJA-AL 1980/1222, 5 Mar. 1980, *reconsidered and denial aff'd*, DAJA-AL 1980/2078, 11 Jun. 1980.

[36] *See* DAJA-AL 1981/2270, 13 Aug. 1981; DAJA-AL 1980/2522, 21 Aug. 1980.

[37] *See* Para. 80254b, DOD Pay Manual.

[38] *See id.* at para. 80254d(3).

[39] *See id.* at paras. 80254d(1), 80254d(2), 80254d(4), 80254d(5).

[40] *See id.* at para. 80254b(4); Army Reg. No. 135-200, Army National Guard and Army Reserve—Active Duty for Training and Annual Training of Individual Members, para 1-23 (C.7, 15 Jan. 1982) [hereinafter cited as AR 135-200].

[41] *See* Para. 80254b(4), DOD Pay Manual; Para. 1-23, AR 135-200.

[42] *See* Para. 4-2j, AR 40-3; Para. 1-21d, AR 135-200.

Aside from the line-of-duty determination, probably the most important factor in any disability incurred by a reservist while on annual training is whether it was caused by an injury or disease. The length of entitlement to pay and allowances and the eligibility for disability retirement and other benefits are conditioned upon this determination. Under the provisions of current law, there is no eligibility for either temporary or permanent retirement if the disability was due to disease unless a medical authority has determined the disease was the result of a service-connected injury.[43]

If the disability is due to injury, was the proximate result of performing active duty or inactive duty training, and the member has at least twenty years of active federal service, he or she is entitled to either permanent retirement if the disability is permanent or temporary retirement if the disability may be permanent regardless of the percentage of disability. If the member lacks twenty years of active federal service, he or she is still eligible for either temporary or permanent retirement if the percentage of disability is 30% or more.[44]

Obviously, in the vast majority of cases, the determination as to whether a disability is due to injury or disease is a simple one. Certainly, if the member is run over by a tank while hiding in the bushes on night maneuvers and is totally and permanently disabled, the issues are fairly clear. Conversely, if a reservist is striken while traveling to AT with "perforated sigmoid diverticulitis," it is fairly obvious that it is a "disease."[45]

But what about the reservist who suffers a heart attack caused by overwork and strain? In *Gwin v. United States*,[46] an Army reserve officer was ordered to active duty for a two week period and, during that time, suffered a heart attack brought on by long hours of work, failure to eat his meals regularly, and the intense heat. He was rendered totally and permanently disabled. Benefits were denied on the grounds that the disability had resulted from a disease not an injury. The court upheld the denial and stated that the legislative history of the statute shows that Congress did not intend to allow disability retirement to persons who are disabled by disease while on short tours of active duty.[47]

A similar case arose a few years later in *Rae v. United States*.[48] In *Rae*, a reserve officer, while on a 15-day active duty tour, suffered a "myocradial infarction, anteroseptol" due to arteriosclerotic coronary thrombosis following an innoculation for influenza. He claimed that his disability had resulted from an "injury." The physical evaluation board, however, ruled that the disability was the consenquence of a disease. The Court of Claims sustained the board's determination.[49]

Likewise, in *Stephens v. United States*,[50] an Army reserve officer performed his normal 15-day reserve tour of duty at Fort Meade, Maryland. While performing this tour, he exerted himself by playing tennis and climbing stairs in exceedingly hot weather. He suffered a myocradial infarction for which he was hospitalized. The medical board found that the disability resulted from a disease, as a myocardial infarction is a common manifestation of a slowly developing arteriosclerotic condition, typical of human males and commencing at an early age. The court upheld the denial of disability benefits.[51]

In another case, a member of the Texas National Guard struck his head while a passenger in a National Guard truck. Thereafter, he became blind. The blindness was originally diagnosed as being due to disease incurred in line-of-duty.[52] The guardsman was separated without disability retirement. Subsequently, it was determined that the injury to the head had caused the blindness and the Army Board for Correction of Military

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[43] *See* 10 U.S.C. §§ 270(b), 1204-21 (1976); Para. 8-2b, AR 635-40.

[44] *See* Table 4-4, AR 635-40.

[45] DAJA-AL 1976/4371, 22 Apr. 1976.

[46] 137 F. Supp. 737 (Ct. Cl. 1956).

[47] *Id.* at 740.

[48] 159 Ct. Cl. 160 (1963).

[49] *Id.* at 169-70.

[50] 358 F.2d 951 (Ct. Cl. 1966).

[51] *Id.* at 955-56.

[52] There was no indication of intentional misconduct or willful neglect.

Records was authorized to correct the member's records to reflect benefit entitlement due to injury.[53]

Another recent case involved an Army reserve major who was injured while on pass during AT. Subsequent to the physical trauma of the accident, he developed mental problems which rendered him unfit for military service. It was medically determined that a psychophysiologic disorder can be construed to be a physical disability resulting from injury. It should be noted that, in this case, the reservist began to complain about his condition a short time after the initial injury and continued to be under medical care and treatment. Therefore, the injury was determined to be the proximate cause of the disability.[54]

There is one other facet of the injury-or-disease issue that should be addressed. If the reservist sustains an injury in line-of-duty and a disease is contracted as a result of the service-connected injury, the disease may also be considered in determining disability entitlement.[55] Also, if a member is hospitalized due to a disease and sustains an injury in line-of-duty before the termination date of the tour of duty, the injury may qualify the member for disability compensation. If the member sustains an injury while on active duty and a further injury occurs after the expiration of the tour of duty, there must be a direct relationship between the original proximate-result injury and the second injury in order for compensation to be provided for the latter injury.[56]

Federal Tort Claims Act

If a reservist is not covered for travel to and from IDT and is injured en route or, if after arriving at the IDT or AT site, is on the way to the rifle range in someone else's vehicle under circumstances that result in a not-in-line-of-duty determination, why not sue under the Federal Tort Claims Act?[57] In a 1966 case, a Naval reservist was picked up at a Navy installation by a Navy plane flown by a regular Navy crew so that he could be transported approximately 230 miles to attend drills at another Naval facility. While he was not required to utilize this mode of transportation, those reservists who wished to do so would report to the airfield in full uniform for a roll call. At this formation, normal military commands and courtesies were in force. Thereafter, those who wished to do so boarded the plane for the flight to the reserve training center at the other location. On the occasion in question, the plane crashed causing severe injuries to the reservist. The court denied his Federal Tort Claims Act claim under the *"Feres* doctrine," holding that the injuries resulted from "activity incident to military service."[58]

The critical question was not whether the member was acting pursuant to orders at the time of the accident, but rather the peculiar or special relationship of the soldier with his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Federal Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty. These considerations led the United States Supreme Court in *Feres v. United States*,[59] to hold that the government is not liable for injuries to service personnel which arise out of or in the course of activity incident to military service.[60]

More recently, this rule was followed in *Mattos v. United States*,[61] where a Marine reservist was killed while riding in a military truck pursuant to his military duties. The court specifically held that the *Feres* doctrine is applicable to reservists participating in weekend training. The court further held that one soldier may not sue another for negligent acts performed in line of duty because discipline could be weakened so much that an Army would be an undisciplined mob if one could

[53]DAJA-AL 1981/2349, 19 Mar. 1981.

[54]DAJA-AL 1980/3069, 3 Nov. 1980.

[55]*See* Para. 8-2b, AR 635-40.

[56]*See id.* at para. 8-2d.

[57]28 U.S.C. ch. 171 (1976).

[58]United States v. Carroll, 369 F.2d 618, 621 (8th Cir. 1966).

[59]340 U.S. 135 (1950).

[60]*Id.* at 146.

[61]274 F. Supp. 38 (E.D. Cal. 1967), *aff'd*, 412 F.2d 793 (9th Cir. 1969).

civilly litigate with others over the performance of one's duties.[62]

In *Herreman v. United States*,[63] suit was brought for the death of a National Guard member killed in the crash of a military aircraft. The member was in uniform and subject to military courtesies and discipline. At the time of the crash, he was returning from a purely social visit to another member. However, the plane was on a duly authorized and duty scheduled navigational training flight. It was held that the death was incident to service and that there was no entitlement to any recovery under the Federal Tort Claims Act.[64] Recovery was also denied in cases in which a U.S. Military Academy Cadet was killed in the crash of an Air Force plane while the cadet was on leave,[65] in which an Air Force medical officer and family in on-base quarters were killed due to crash of military aircraft on overseas base,[66] and in which the insured's trailers, which were used as active duty residences at an Air Force base, were destroyed by the crash and explosion of military aircraft.[67]

Consequently, it would appear that a reservist cannot recover under the Federal Tort Claims Act for injuries incurred incident to performance of reserve duties whether in connection with IDT or AT/ADT. Recovery for injuries incurred while traveling to or from IDT would also seem to be precluded.

Disability Severance Pay

In those cases in which a member is disabled due to an injury which was the proximate result of performing active duty, active duty for training, or inactive duty training and it is determined that such disability will or may be permanent, but the disability is less than 30% and the member does not have at least twenty years of active federal service, there is no entitlement to retirement. In such cases, the member may be discharged with disability severance pay.[68]

Disability severance pay is computed by multiplying the sum of two months basic pay by the number of years of active service (but not over 12). The "years of service" are determined in accordance with the personnel regulations of each service. A fraction of a year which is six months or more is counted as a whole year and a part of a year which is less than six months is not counted. A member who has less than six months active service is not entitled to disability severance pay.[69] If a member is statutorily eligible, he or she may elect to be transferred to the retired reserve instead of being discharged with severance pay.[70]

Death Gratuity

The eligible beneficiaries of any member of a reserve component are entitled to receive a death gratuity regardless of whether death occurred in line-of-duty or was the result of the member's misconduct. To qualify, the member must have died while on inactive duty training, from an injury incurred while traveling directly to or from inactive duty training, within 120 days after discharge on release from inactive duty training if the Administrator of Veteran's Affairs determines that death resulted from an injury incurred or aggravated while performing, or traveling directly to or from inactive duty training, while on active duty, from an injury incurred while traveling directly to or from active duty, or within 120 days after discharge or release from active duty if the Administrator of Veterans' Affairs determines that death resulted from an injury incurred or aggravated while performing or traveling directly to or from such duty.[71]

The death gratuity equals six months' basic pay plus incentive and special pays, including profi-

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[62]274 F. Supp. at 38-39.

[63]476 F.2d 234 (7th Cir. 1973).

[64]*Id.* at 236-37.

[65]Archer v. United States, 217 F.2d 548 (6th Cir.), *cert. denied*, 348 U.S. 953 (1955).

[66]Orken v. United States, 239 F.2d 850 (6th Cir. 1956).

[67]Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955).

[68]*See* 10 U.S.C. § 1206 (1976); Para. 80343, DOD Pay Manual; Table 4-4, AR 635-40.

[69]*See* Paras. 40431-33, DOD Pay Manual.

[70]*See* 10 U.S.C. § 1209 (1976); Para. 8-7, Table 4-4, AR 635-40.

[71]Paras. 80342, 80255, DOD Pay Manual.

ciency and hostile fire pay, at the rate to which the decedent was entitled at time of death but not less than $800 nor more than $3000.[73] Such payments are to be made within 24 hours of the death wherever possible.[73]

Miscellaneous Benefits

Burial Expenses Under federal law, certain burial expenses are covered when a reservist dies on active duty, while performing authorized travel to or from active duty, or on authorized active duty.[75] Travel to and from inactive duty would not appear to be covered.[76]

VA The Veteran's Administration provides Dependency and Indemnity Compensation as well as educational assistance to the surviving spouse and children of certain veterans. No effort has been made to analyze these entitlements. Appropriate inquiry should, therefore, be made to the local VA office to determine any such entitlements.

Summary

In conclusion, there are a wide variety of benefits to which a reservist may become entitled as a result of injury or disease sustained or incurred in connection with the performance of his or her reserve obligations. So too there are benefits available to a surviving spouse and children as well as other eligible beneficiaries. It is hoped that this brief review will assist those concerned in determining whether and which benefits are available.

Accepting the Challenge: Congress Reverses *McCarty*

97-252

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On 26 June 1981, the United States Supreme Court in *McCarty v. McCarty*[1] held that federal law preempted individual states from dividing military retired pay as part of the distribution of community property incident to a divorce proceeding. Prior to this decision, military retired pay was treated as divisible community property by courts adjudicating marital dissolution actions in community property states. The Court, based on its interpretation of the federal statutes which established the military retirement scheme, concluded that, in the context of military retirement pay, state community property laws "interfere directly with a legitimate exercise of power of the Federal Government."[2] But Justice Blackman, writing for the majority, challenged Congress to change the federal policy reflected by the statutory scheme, stating:

> We recognize that the plight of an ex-spouse of a retired servicemember is often a serious one . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired servicemember. This decision, however, is for Congress alone.[3]

Congress grappled with this challenge for over a year. Several bills were introduced in both Houses to reverse the perceived "inequities" of the *McCarty* decision. Hearings were conducted and proponents and opponents of a legislative initiative to reverse *McCarty* mounted political offensives in support of their respective positions.[4] Recently, Congress answered the Supreme Court's challenge by passing legislation which reverses *McCarty* and provides for direct federal payment

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[73] *Id.* at para. 40506.

[74] *Id.* at para. 40507. *See also* 45 Comp. Gen. 740 (1966).

[75] *See* 10 U.S.C. §§ 1481(a)(2), 1482 (1976).

[76] *See* 45 Comp. Gen. 740 (1966).

[77] *Id.*

[1] 453 U.S. 210 (1981).

[2] *Id.* at 236.

[3] *Id.* at 235-36.

[4] *See* Report of the Committee on Armed Services, S. Rep. No. 97-502, 97th Cong., 2d Sess. (1982).

of certain alimony, support, and property distribution orders issued against military retirees.[5] This legislation was adopted in amendments to the Defense Authorization Act for Fiscal Year 1983,[6] which was signed into law by President Reagan on 8 September 1982. The statute becomes effective on 1 February 1983.

Existing Laws Permitting Division of Certain Federal Pay

Congressional action concerning the right of state courts to divide federal retired pay did not begin with the military retired pay issue. In 1978, Congress enacted a law which permits state courts to divide federal civil service employee retirement pay as part of a marriage dissolution or divorce action.[7] This law, which does not apply to military members, requires the Office of Personnel Management to comply with judicial decrees and property settlement agreements in which this federal retired pay was divided. There is no limit on the percentage of retired pay that could be awarded to the former spouse under this statute.

Congress subsequently acted in 1980 to allow state courts to divide the retired pay of federal foreign service employees.[8] This statute entitles ex-spouses of foreign service employees to receive up to 50 percent of the employee's retired pay, provided that the former spouse was married to the employee for at least ten years of the employee's foreign service career. Unlike the civil service law, which leaves the determination of the ex-spouse's right to retired pay to state courts, the Foreign Service Act creates an entitlement for these former spouses.

Military Retired Pay—The Legislative Solution

Legislative proposals to reverse *McCarty* took three forms: the return to state courts of unlimited authority to divide military retirement pay (similar to the civil service method), the creation of a federal entitlement to a portion of military retired pay for ex-spouses (similar to the foreign service approach), and the return to state courts of limited authority to divide military retirement pay during divorce actions. This latter method was embodied in S. 1814, the Uniformed Services Former Spouses Protection Act, which eventually evolved into the federal statute reversing *McCarty*.[9]

Division of Military Retired Pay

The federal provisions reversing *McCarty* are contained in Title X, Sections 901 to 906 of the Defense Authorization Act for FY 1983.[10] The new "anti-*McCarty*" statute permits state courts to consider military retired pay when dividing property rights between parties in a divorce or dissolution action. The statute requires no minimum length of marriage of the spouse and servicemember before a state court is authorized to divide military retired pay.

Limitations on Amount

The statute limits the amount of retired pay that may be awarded by state courts as marital or community property to a maximum of 50 percent for a single court decree and a total of 65 percent for multiple court orders concerning separate support obligations or property awards for different payees. The enactment also precludes a former spouse from the transferring a court awarded interest in military retired pay by sale, gift, or bequest. Once a former spouse is awarded such interest, however, it becomes a lifetime interest and does not terminate upon remarriage. All rights to military retired pay terminate upon the death of the military retiree.

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[5] *See* 128 Cong. Rec. H5957-5960 (daily ed. 16 Aug. 1982).

[6] Pub. L. No. 97-252, Tit. X, §§ 901-06, ___ Stat. ___ (8 Sept. 1982) (to be codified at 10 U.S.C. §§ 901-06).

[7] 5 U.S.C. § 8354(j) (1980).

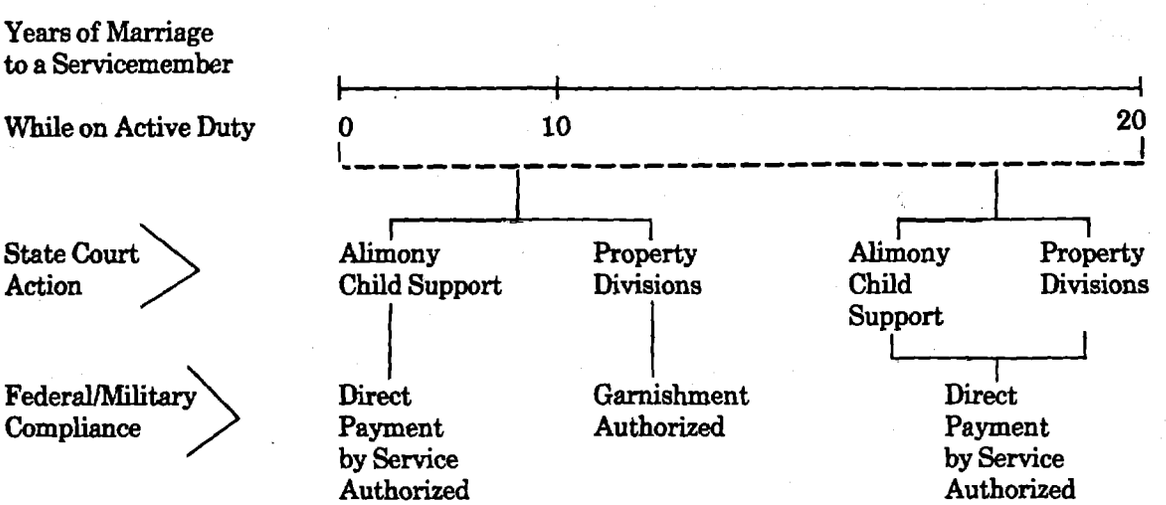
[8] Foreign Service Act of 1980, Pub. L. No. 96-405 (codified at 22 U.S.C. §§ 4044-66 (1980)).

[9] On 22 July 1982, the Senate Armed Services Committee approved a substitute version of S. 1814. Similar provisions were introduced in the House as amendments to the Defense Authorization Act for Fiscal Year 1983. H.R. No. 6030, 97th Cong., 2d Sess., 128 Cong. Rec. H4717 (daily ed. 28 Jul. 1982). The provisions of H.R. No. 6030 were incorporated into S. 2248, which was signed into law on 8 September 1982.

[10] To be codified at 10 U.S.C. §§ 901-06.

Direct Payment

Interestingly, the new statutory scheme creates a direct payment system for ex-spouses entitled to a portion of military retired pay pursuant to court ordered alimony, support, and property distribution orders in three instances. If the former spouse was married to a servicemember for at least ten years while the servicemember performed military service, he or she can now demand that the appropriate military finance center issue a separate check to the former spouse to enforce a court ordered division of property. A former spouse is also entitled to direct payment for court-awarded alimony and child support regardless of the length of the marriage. Service Secretaries are further authorized to honor state garnishment orders for nonpayment of property settlement orders. Such garnishment represents an expansion of the limited right to garnish military retired pay, which, until enactment of this law, was restricted to the collection of alimony and child support payments.[11] The following diagram indicates the state court powers for dividing military retired pay and the federal compliance requirements:

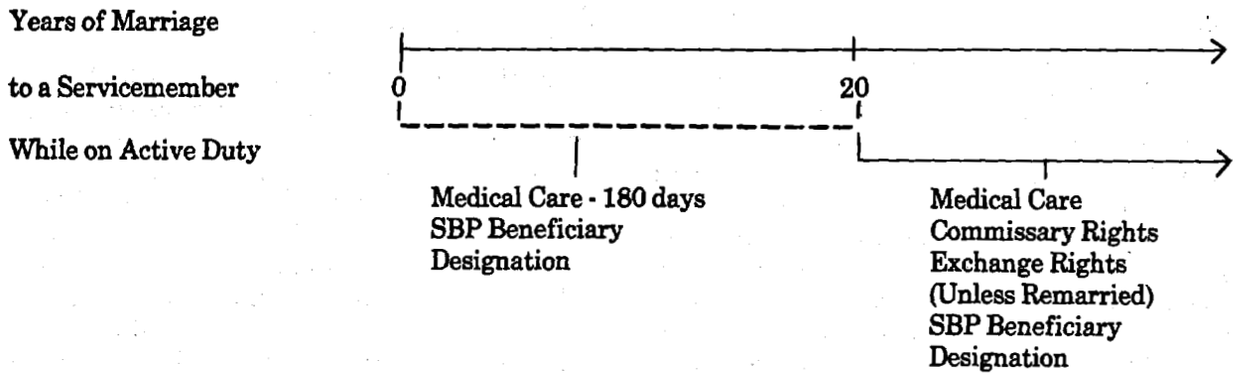


Additional Military Benefits

The statute authorizes military medical, commissary, and exchange benefits for certain former spouses of military personnel. All ex-spouses are entitled to 180 days of medical care immediately following the termination of the marriage. Unremarried former spouses who were married to service personnel while the military spouse performed at least twenty years of creditable service are entitled to full medical, commissary, and exchange rights. A divorced servicemember also can elect to designate the former spouse as a beneficiary under the Survivor Benefit Plan (SBP).[12] This designation must be based on a separation agreement to that effect. Courts are specifically prohibited from ordering a servicemember to designate his ex-spouse as a beneficiary under the SBP. The designation of a former spouse would preclude the designation of a subsequent spouse as a beneficiary. The next chart illustrates the military benefits for ex-spouses of military personnel at various years of service:

[11] 42 U.S.C. § 659 (1980).

[12] *See* 10 U.S.C. § 1448 (1980).



Protection of Servicemembers

To protect servicemembers, the law requires compliance with the provisions of the Soldiers' and Sailors' Civil Relief Act.[13] The statute also prohibits "forum shopping" by nonmilitary spouses by stating that state courts cannot treat military retired pay as property unless the court has jurisdiction over the servicemember by reason of the servicemember's residence in the state—unless that residence is solely due to compliance with military orders, domicile in the state, or consent to the court's jurisdiction. This jurisdiction provision creates a potential conflict between federal and state laws. Under the federal statute, a California court could not divide the retired pay of a Mississippi domiciliary serving under military orders at Fort Ord, California unless the servicemember consented to the court's jurisdiction. Under California law, however, the servicemember's physical location within the state gives the court *in personam* jurisdiction over him. Apparently, this conflict between federal and state laws has been left for judicial resolution.

The question of who determines jurisdictional propriety in these cases is itself complex. The current controversy over the responsibility of military finance centers to determine the validity of state court orders before withholding funds pursuant to garnishment actions highlights this issue. In *Morton v. United States*,[14] Court of Claims Judge Mastin White required the Air Force Finance Center to examine the jurisdictional basis of a state court order prior to compliance with a garnishment writ. The government has appealed this case to a full panel of the Court of Claims.[15] The Comptroller General has issued a decision that contradicts *Morton* and requires government agency compliance with orders "regular or valid on their face."[16] This latter compliance standard should also apply to state court orders affecting military retired pay distributions, *i.e.*, military finance centers should honor state court orders dividing military retired pay if the orders are valid on their face. Jurisdictional disputes must be resolved in court, not military finance centers, without affecting the liability of the United States Government.

Retroactivity

The statute applies retroactively in certain instances.[17] Under the new law, modification orders issued after the statute's enactment which modify divorce decrees issued after *McCarty* (26 June 1981) and award a portion of military retired pay to the nonmilitary spouse are enforceable. This provision will undoubtedly result in considerable litigation by parties seeking to take advantage of the change in federal legislative intents by modifying post-*McCarty* divorce decrees in which mili-

[13]50 U.S.C. §§ 501-90 (1980).

[14]Morton v. United States, No. 290-77 (Ct. Cl. 1982).

[15]A Navy Finance Officer expressed the armed services' reasons for seeking a reversal of Judge White's decision: "If the services have to go into court to fight these orders we would need a staff 2,000 times what it is now . . . we can't really question these orders. We would be in contempt of court if we spent months looking into whether they are right or wrong." The Army Times, 22 Feb. 1982, at 40, Col. 4.

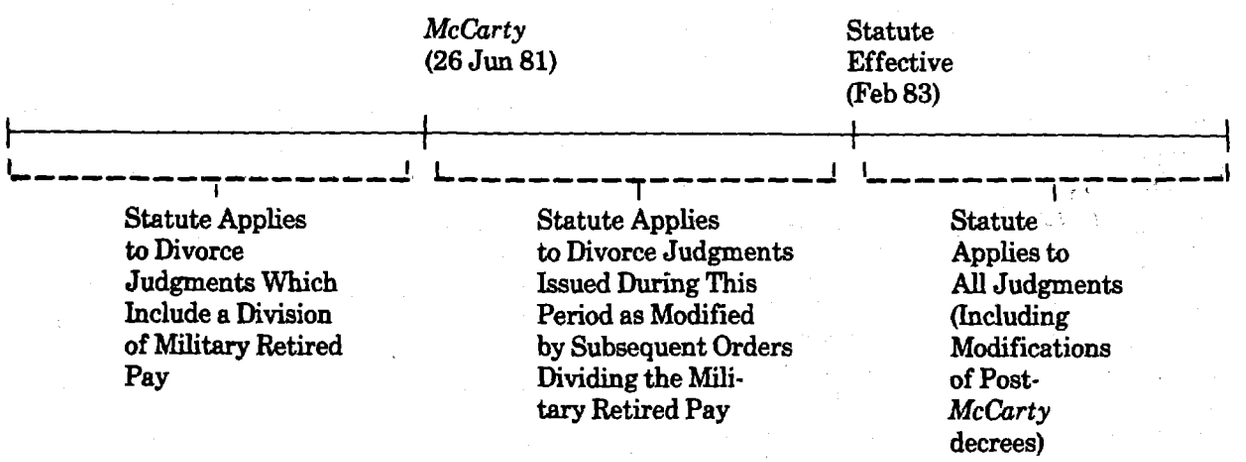
[16]61 Comp. Gen.____, Comp. Gen. Dec. B-203668 (Feb. 1982).

[17]*See* Cong. Rec. H5957-5960 (daily ed. 16 Aug. 1982).

tary retired pay was not divided. The statute, except for the medical, commissary, and exchange benefits provisions, also applies to all pre-*McCarty* orders awarding a portion of military retired pay to ex-spouses.

Although the conference report contains no prohibition against courts reopening pre-*McCarty* decisions, the House-Senate conferees agreed that court orders final before *McCarty*, which were later modified to set aside the division of military retired pay based on the *McCarty* decision,[18] should be treated as if the post-*McCarty* modification had not occurred and the original court decrees should be enforced.[19] The conferees also concluded that courts should not consider the enactment of this statute as a mandate to reopen and to modify pre-*McCarty* decisions in which military retired pay was not divided. The exact extent of the statute's retroactive application remains subject to interpretation and, most likely, litigation.

Division of Military Retired Pay: Retroactivity



Conclusion

The new statute clearly reverses *McCarty* and empowers state courts to divide military retired pay as part of a distribution of community and marital property incident to a divorce or dissolution proceeding. It further creates a right to direct payment of an interest in military retired pay resulting from a court order for alimony, support, and, in some cases, property division. "Twenty year" spouses will receive additional military benefits, and servicemembers can designate former spouses as SBP beneficiaries.

Guidelines for the direct payment process remain to be written. The statute's retroactive application and jurisdictional limitation provision await clarification, probably through litigation. Predictably, ex-spouses of service personnel who were divorced since *McCarty* will seek modification of their orders to take advantage of the statute. Like the Supreme Court's decision in *McCarty*, the statute raises many questions and invites litigation. But no statute can resolve all the issues involved in this complex problem. Congress has answered the Supreme Court's challenge and thrown the gauntlet back to the courts.

[18] *See, e.g., Ex Parte* Buchanan, 626 S.W.2d 65 (Tex. Civ. App. 1981).

[19] 128 Cong. Rec. H5999-6000 (daily ed. 16 Aug. 1982).

The Prompt Payment Act: Increased Interest Liability for the Government

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On 1 October 1982, the effective date of the Prompt Payment Act (PPA),[1] a major transformation occurred in the law governing payment of interest by the United States. Under the Act, the government has become liable for interest on delayed payments. Other significant provisions include:

* compound interest on unpaid undisputed vouchers.

* controls on prompt payment discounts.

* congressional oversight.

* authority to contractually modify the PPA's effect in most contracts.

Because of its potential impact on every agency budget and procedure, it is important that all procurement attorneys become familiar with the Act. To assist them, the Office of Management and Budget (OMB) has provided regulations and guidance.[2] Since the adverse impact of this Act may be minimized by contractual provisions, procurement attorneys should keep interest liability in mind when reviewing new contracts.

I. Statutory Provisions

A. *Contracts Subject to the Act*

The Act applies to all contracts between a federal agency and a business concern. The definition of federal agency is very broad and the Congress specifically intended that certain nonappropriated fund instrumentalities be included within this definition.[3] The definition of business concern is similarly very broad; included are all "persons", natural or legal, including nonprofit organizations.[4] The term "contract" includes contracts for supplies and services, leases of real and personal property, and, presumably, construction contracts.[5] Given the broad coverage, it is difficult to imagine a contract not covered by the Act.

B. *When Interest Begins to Run*

Two factors control when the interest period begins to run: the items being procured and whether the contract specifies a payment date.

For contracts which specify a payment date, the principal issue should be an interpretation of the payment date. To avoid ambiguity, the payment date should be identified as the "required payment date," which is the statutory terminology.[6] If a date certain, *i.e.*, 10 July 1983, is not specified, then the payment date should be specified as a set number of days—either calendar or work days—after some triggering event, such as delivery, acceptance, or submission of a proper invoice. The OMB has provided for a specified inspection period prior to acceptance.[7] Until the Act is fully implemented and standard contract language is drafted, contract attorneys should carefully scrutinize the contract language to identify ambiguities creating unintended liability for interest penalties.

For those contracts in which no payment date is specified, the required payment date is usually 30 days after receipt of a proper invoice or acceptance of the goods and services.[8] Interest begins to ac-

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[1] P.L. 97-177, 96 Stat. 85 (1982) (to be codified at 31 U.S.C. §§ 1801-06) [hereinafter cited as 31 U.S.C.].

[2] Office of Management and Budget Circular No. A-125, 47 Fed. Reg. 37, 321 (1982) [hereinafter cited as OMB Cir.].

[3] *See* 31 U.S.C. § 1805(1); H.R. Rep. No. 97-461, 97th Cong., 2d Sess. 16 (1982) reprinted at 1982 U.S. Code Cong. & Congressional News III.

[4] 31 U.S.C. § 1805(2).

[5] *Id.* at § 1805(6); OMB Cir. at para. 4d.

[6] 31 U.S.C. § 1801(a)(1).

[7] OMB Cir, at para. 6a.

[8] 31 U.S.C. § 1801(a)(2)(A).

crue on the 31st day. Congress intended that the 30 day payment period will be the norm.[9] The 30 day period is triggered by acceptance by the procuring agency or receipt of a proper invoice for the goods and services by the servicing finance office. Since, acceptance of goods and services by an agency is not defined in the Act, an attorney should use the normal definition.[10] Receipt of a proper voucher is defined as *actual* receipt at the *proper* finance center. This definition permits the contract to specify the proper finance center by its terms. OMB requires that this be done.[11] The importance of receipt dictates use of a date/time stamp on payment vouchers.

Contracts for meat and agricultural products operate under the same rules as other contracts without a specified payment date, but the time limits are much shorter. Payments for most meat products are due in seven days.[12] Other agricultural products must be paid within ten days. The contract *cannot* vary these statutory time periods.

C. *Interest Liability*

Should a proper invoice not be paid by the required payment date, the government still has a grace period of 15 days for supplies and services, five days for agricultural products, and three days for meat products.[13] Payment during the grace period cancels liability for interest. This interest liability can be substantial. The Prompt Payment Act adopts the interest rate specified in the Contract Disputes Act of 1978.[14] Unlike the Disputes Act, however, delayed payment interest is compounded monthly.[15] At the current interest rate of 15½ percent, the impact on an agency's budget is obvious; every 30 days the amount due on an unpaid voucher is increased by 1.3 percent.

This interest continues to accrue until the voucher is paid, as evidenced by the date on the check[16], the contractor files a claim for nonpayment under the Contract Disputes Act, or after one year has elapsed.[17] These rules prevent the contractor from receiving a double interest payment and force the contractor to file a claim to keep the interest accruing after one year of nonpayment. The latter provision should prevent the contractor from sitting back and profiting from a clerical ommission.

There is no interest liability if nonpayment is due to the existence of a dispute between the contractor and the government or if the amount is less than $1.00.[18]

D. *Limitation On Discount Payments & Congressional Oversight*

Congress was particularly irritated by the practice of some agencies of paying vouchers late, yet taking the prompt payment discount offered by the contractor.[19] Consequently, Congress has specifically forbidden this practice.[20]

In order for a discount to be earned, the date on the check for payment must be prior to the discount date specified in the contract.[21] If this is not the case and a prompt payment discount was taken, the agency must correct the underpayment within the grace period[22] or pay interest on the underpayment.[23] Since prompt payment discounts offer substantial savings[24], there are other practical reasons for taking care in processing these vouchers.

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[9] H.R. Rep. No. 97-461, *supra* note 3, at 8.

[10] *See* Defense Acquisition Reg. § 14-001.6 (28 July 1976); Defense Acquisition Reg. § 14-306 (18 Jun. 1976) [hereinafter cited as DAR].

[11] OMB Cir. at para. 6a.

[12] 31 U.S.C. § 1801(a)(2)(b).

[13] *Id.* at § 1801(b)(1).

[14] *Id.* For current rates, *see* 47 Fed. Reg. 27, 654 (1982).

[15] OMB Cir. at para. 6a.

[16] 31 U.S.C. § 1805(5).

[17] *Id.* at § 1803(a)(2).

[18] OMB Cir. at para. 9.

[19] H.R. Rep. 97-461, *supra* note 3, at 10.

[20] 31 U.S.C. § 1802.

[21] *Compare id.* at § 1805(5) *with* id. at § 1802(a).

[22] OMB Cir. at para. 8b.

[23] 31 U.S.C. § 1802(b).

[24] *See* Nagle, *Prompt Payment Discounts in Government Contracts*, 13 Pub. Cont. L.J. 108 (1982).

To enforce the Act, Congress has mandated a reporting system. Agencies will be required to provide Congress, thru OMB, data regarding their performance in meeting the required payment dates.[25] OMB requires a report including the number, total dollar amount, frequency, and causes of interest payments, the frequency of early payments, and the progress from prior years.[26]

To minimize the perceived mismanagement which has caused late payments, Congress has required that interest be paid from existing appropriations.[27] Otherwise lawful transfers of funds between existing accounts to pay interest penalties however, are not prohibited.[28]

E. *Relationship to the Contract Disputes Act*

One of the most significant features of the Prompt Payment Act is its nonapplicability to contract disputes. If failure to pay is due to rejection of nonconforming goods, failure to comply with other contractual provisions, contractually authorized withholding, or some other similar *bona fide* reason, interest does not automatically accrue, regardless of the government's success on the merits of the dispute. The Act provides:

> Except as provided in section 3 with respect to disputes concerning discounts, this Act shall not be construed to require interest penalties on payments which are not made by the required payment date by reason of a dispute between a Federal agency and a business concern over the amount of that payment or other allegations concerning compliance with a contract. Claims concerning any such dispute, and any interest which may be payable with respect to the period while the dispute is being resolved, shall be subject to the Contract Disputes Act of 1978.[29]

Through use of the language "dispute . . . over the amount of that payment or other allegations concerning compliance with a contract," Congress seemingly intended to provide for a dichotomy of remedies. Disputes over payment will be resolved under the Contract Disputes Act and delays in payment under the Prompt Payment Act.[30] This view also strengthens the notion that unreasonable delays in payment do not automatically become claims under the Disputes Act. If such claims had been allowed, there would have been no need for the Prompt Payment Act.[31]

Under prior law, recovery of interest on delays in payment was permitted only if there was express statutory or contractual authority.[32] The Disputes Act authorized recovery of interest upon receipt of the contractor's claim by the contracting

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[25]31 U.S.C. § 1804.

[26]OMB Cir. at para. 11.

[27]31 U.S.C. § 1801(c).

[28]H.R. Rep. No. 97-461, *supra* note 3, at 9.

[29]31 U.S.C. § 1803(b).

[30]In H.R. Rep. No. 97-461, *supra* note 3, at 15, the committee stated:

> Provisions of this Act providing for the payment of interest penalties on overdue bills are not applicable when there is a dispute between a Federal agency and a business concern over the terms and/or manner of compliance with a contract. The Committee intends that any questions concerning the amount of an invoice or the performance of a contract be raised in good faith, in order to establish a bona fide dispute between the agency and the business concern involved. The resolution of such disputes shall be governed by the provisions of the Contract Disputes Act, which Act shall also control the rate and conditions under which interest penalties will accrue in such instances.

[31]*See* H.R. Rep. No. 97-461, *supra* note, 2 at 11, wherein the committee stated:

> The Committee intends, however, that interest penalties resulting from provisions of the Prompt Payment Act will accrue automatically, and that payment of such penalties shall be made by Federal agencies without the necessity for a business concern to file a formal claim for the payment of such interest under provisions of the Contract Disputes Act.

See also id. at 8:

> *Claims for interest.*—The Committee intends that Government agencies will automatically be obligated to pay interest penalties without the necessity for business concerns to take action to collect such payments.

[32]United States v. Thayer-West Point Hotel, 329 U.S. 585 (1947); Ramsey v. United States, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951); Memco, ASBCA No. 18731, 74-1 BCA ¶ 10,626.

officer.[33] The definition of a "claim" assumed central significance.[34] The General Services Board of Contract Appeals held that delay in payment alone amounted to a claim whose receipt was imputed to the contracting officer.[35] Other boards, including the Armed Services Board of Contract Appeals, have held that a subsequent act of conversion was required before unreasonable delays in payment became claims.[36] In enacting the Prompt Payment Act, Congress apparently recognized the legitimacy of the latter view; the interest provisions of the PPA and Disputes Act are intended to be separate remedies.[37]

The Prompt Payment Act modifies a controversial body of prior law. No longer will contractors need to file a formal claim with the contracting officer to assert a right to interest on pure delays in payment under the Contract Disputes Act. The prior law is still relevant, however, in determining when a dispute exists so that a claim is present to which interest may attach. Once it has been determined that a dispute exists, the Contract Disputes Act and not the Prompt Payment Act will govern.[38]

II. Complying With The Act

A. *Management Measures*

The simplest and most obvious way in which an agency can respond to the Prompt Payment Act is to accede to the congressional intent of the Act and speed its payment processing. For example, an agency may make an expedited partial payment when final payment must be delayed for legitimate reasons. By paying out sums not necessary to protect the government pending final payment, liability for additional interest will be minimized.

A second method for complying with the Act is to specify a payment date in such contracts as permitted by Congress. Interest on unpaid vouchers accrues after 30 days *only* if no payment date is specified in the contract. Specifying a payment date may either increase or decrease this payment period. Extending the 30 day payment period should be considered where a sound reason exists for doing so. For example, in cost reimbursement type contracts where a final cost audit is desired prior to final payment, the contract should provide for payment either after completion of the final audit or a specific period of time after voucher submission. Alternatively a clause authorizing withholding a set amount pending audit completion may be included in the contract. The ability to contractually modify the statutory rule gives a procuring activity a significant amount of control over the impact of the Act.

Another tool for the contracting officer has been provided by the statutory definition of a proper invoice.[39] In addition to the requirements imposed

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[33]41 U.S.C. § 611 (1976) provides:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof.

[34]Note the progression of the Office of Federal Procurement Policy (OFPP) definitions of a claim. *See* OFPP Interim Final Rules of 26 Feb. 1979, 44 Fed. Reg. 12,519 (1979); OFPP Policy Letter 80-3, 45 Fed. Reg. 31,035 (1980); Federal Acquisition Reg. (Draft) Pt. 33 (1982).

[35]Joseph Fusco Constr. Co., GSBCA No. 5717, 81-1 BCA para. 14,837; Capitol Sec. Serv., Inc., GSBCA No. 5722, 81-1 BCA para. 14,923; Dawson Constr. Co., Inc., GSBCA No. 5777, 80-2 BCA para. 14,817.

[36]Federal Elec. Corp., ASBCA No. 24002 (14 June 1982); Oxwell, Inc., ASBCA No. 25703, 81-2 BCA para. 15,392; Patlock Constr. Co., ASBCA No. 25345, 81-1 BCA para. 14,993.

[37]*See* note 29 and accompanying text *supra*.

[38]The legislative history of the Contract Disputes Act is silent as to whether interest liability may arise without a formal claim received by the contracting officer. The language of 41 U.S.C. § 611 (1976) would indicate that interest should not commence until the contracting officer *receives* a claim. The act of receipt by the contracting officer is necessary so that person can be charged with knowledge that a dispute exists. This interpretation serves the policies of the Contract Disputes Act by encouraging prompt settlement of disputes without litigation. *See* S. Rep. No. 95-1118, 95th Cong., 2d Sess. 1 (1978); H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. 18 (1978). Imputing a dispute based on reasonableness of elapsed time until payment would not encourage contracting officers to settle claims as they would not know of their existence. A separate administrative reporting system would be necessary for constant surveillance of payment vouchers. In effect this is what the Prompt Payment Act imposes. It is submitted that this is not what Congress intended to accomplish with passage of the Contract Disputes Act.

[39]OMB Cir. ¶ 6c. *See also* DAR § 7-103.30 (specifies what an invoice must include in order to be proper and designates certain other rules for determining when interest begins to accrue).

by OMB,[40] the procuring activity may further specify, either by regulation or by contract, what documentation must accompany an invoice before it is deemed "proper." Additional documentation may expedite the processing. An improper invoice, however, will still accrue interest unless the defects are discovered and pointed out to the contractor within 15 days.[41] One requirement which should be placed upon the contractor is to boldly "flag" or highlight those invoices which have a very short payment period, such as meat and agricultural products or vendors with prompt payment discounts. A finance office would thus recognize and expeditiously process those particular invoices. Interest on an improper invoice will cease to accrue once the contractor is informed of the defects.[42]

B. *Legal Considerations*

In addition to the management considerations outlined above, procurement agencies should consider the legal ramifications of complying with the Act. For the military contractors, the Prompt Payment Act is an alternative method of recovering interest on pure delays in payment.[43] Contractors will prefer the PPA because interest accrues automatically without the necessity of a formal claim. However, if the government refuses to pay to pay the interest, then a dispute exists and the contractor must file a claim under the Disputes Act. Interest will accrue on this claim from date of submission under the Contract Disputes Act and not the Prompt Payment Act.

III. Conclusion

The Prompt Payment Act provides governmental liability for delays in payment after a reasonable time for payment has elapsed without the necessity of a claim conversion letter to the contracting officer. Thus, the PPA extends governmental liability to an earlier point in time for pure delays in payment and defines a reasonable period of time for payment. If the government can establish a dispute as to entitlement or amount, it will avoid the extension of liability. Further, if it can establish that payment was not late because the triggering event, such as acceptance, did not occur, interest will not automatically accrue under the PPA.

Procurement litigators may expect more late payment appeals before the boards. While the government will no longer be able to defend against such appeals on the grounds of sovereign immunity, it can resist liability premised on the Prompt Payment Act by establishing the existence of a dispute. The body of law developed under the Contract Disputes Act is relevant for that determination.

As to future contracts, Congress has unequivocally consented to pay interest on delayed payments. It has given a definition of a late payment to the agencies and has stated its desire that there will not be any late payments in the future. Procuring activities will thus either have to change their ways or pay the consequences.

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[40]OMB Cir. at para 6b.

[41]31 U.S.C. § 1801(a)(2)(D).

[42]OMB Cir. at para. 9.

[43]*See* DAR § 1-314(b)(2).

Nonjudicial Punishment

Quarterly Punishment Rates Per 1000 Average Strength
April–June 1982

	Quarterly Rates
ARMY-WIDE	44.23
CONUS Army commands	45.06
OVERSEAS Army commands	42.83
USAREUR and Seventh Army commands	41.33
Eighth US Army	56.47
US Army Japan	18.20
Units in Hawaii	39.51
Units in Alaska	41.09
Units in Panama	57.57

Courts-Martial

Quarterly Court-Martial Rates Per 1000 Average Strength
April–June 1982

	GENERAL CM	*SPECIAL CM*		*SUMMARY CM*
		BCD	NON-BCD	
ARMY-WIDE	.52	.84	.50	1.21
CONUS Army commands	.46	.66	.48	1.08
OVERSEAS Army commands	.62	1.15	.53	1.43
USAREUR and Seventh Army commands	.72	1.26	.48	1.43
Eighth US Army	.46	.80	.70	1.29
US Army Japan	—	.39	—	1.16
Units in Hawaii	.28	.61	.72	1.11
Units in Alaska	.12	1.42	.59	2.13
Units in Panama	—	.42	1.11	1.95

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

Legal Assistance Items

Major Joseph C. Fowler, Major John F. Joyce, Major William C. Jones,
Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell
Administrative and Civil Law Division, TJAGSA

1. Involuntary Support Allotments

Congress recently enacted Public Law 97-248, which establishes an involuntary allotment from the pay of active duty servicemembers for the collection of child and spousal support when the servicemember is two months or more in arrears in support payments. The U.S. Army Finance and Accounting Center (USAFAC) has formulated procedures for implementing the involuntary allot-

ment law. The following information concerning involuntary allotments has been provided by Mr. David L. Gagermeier, Chief, Legal Office, USAFAC, and Ms. Marie Joachim, an attorney-advisor in that office:

Public Law 97-248 added Section 465 to Title 42, United States Code, effective 1 October 1982, to provide for involuntary allotments from active duty military pay for child or child and spousal support in cases where an active duty servicemember has failed to make payments under a support order and the resulting delinquency is in a total amount equal to the support payable for two months or longer.

No action may be taken, however, to require such allotment until the member has personally consulted a judge advocate or legal officer and discussed the legal and other factors concerning the member's support obligation and the consequences of failure to make payments thereon. The Allotment may be ordered if 30 days have elapsed after notice is given to the member and it has not been possible, despite continuing good faith efforts, to arrange such a consultation.

Notice of failure of an active duty member of the U.S. Army to make the required payments must be sent to Commander, U.S. Army Finance and Accounting Center, Attn: FINCL-G, Indianapolis, Indiana, 46249, by a state agent or attorney with responsibility for recovering amounts owed as child or child and spousal support or by a court or agent of a court with authority to issue an order against a member for the support and maintenance of a child.

When USAFAC receives the notice and a copy of the underlying support order or evidence of a support obligation, a letter will be sent to the servicemember, through his or her commander, advising the member that the notice of support delinquency has been received and that an involuntary allotment will be established. The member will be informed of the effective date of the allotment, the amount or percentage of pay that will be withheld each month, and that the allotment will continue until further notice is received from the state agency or court. The member will be advised to arrange an appointment with a judge advocate or legal officer to discuss the legal and other factors involved. A copy of the notice and supporting documentation will be sent to the member along with the letter.

At the same time, a letter and copy of the notice and support order will be sent by USAFAC to the member's legal assistance officer. This notice will inform the legal assistance officer of the member's support delinquency, of the requirement for a consultation, and will request that USAFAC be notified, in writing within 30 days, that the consultation has taken place or that it was not possible, despite continuing good faith efforts, to arrange such a consultation.

Upon receipt of such notification from the legal assistance office, USAFAC will establish the allotment for the amount of the support order. The Allotment may include amounts for current support and arrearages but may not exceed the limits prescribed at 15 U.S.C. 1673: 50% of aggregate disposable earnings if the member is supporting a spouse and/or dependent child, other than a party for whom the involuntary allotment is being established; 60% of aggregate disposable earnings if the member is not supporting another dependent or does not submit evidence of support; plus an additional 5% (55% or 65%) of disposable pay if there is an arrearage in amount equivalent to the support obligation for 12 weeks or more.

Once the allotment is established, it can be adjusted or discontinued only upon notice from the state agency or court which furnished the original notice.

Regulations pertaining to involuntary child or child and spousal support allotments are being promulgated by the Department of Defense. Questions concerning the law or its implementation may be addressed to Commander, US Army Finance and Accounting Center, Attn: FINCL-G, Indianapolis, Indiana, 46249. The telephone number is AUTOVON 669-2155, FTS 335-2155 or commercial (317) 542-2155.

2. Soldiers' and Sailors' Civil Relief Act Videotape

The Legal Assistance Branch of the Administrative and Civil Law Division, TJAGSA, has produced a videotape entitled "An Introduction to the

Soldiers' and Sailors' Civil Relief Act." This 6-minute-45-second videotape is the third in a series; the other tapes discuss wills and powers of attorney. These videotapes are designed for use in legal assistance office waiting rooms, unit preventive law classes, and predeployment briefings. Legal assistance officers can obtain a copy of the Soldiers' and Sailors' Civil Relief Act videotape by sending a blank ¾-inch videotape cartridge to The Judge Advocate General's School, U.S. Army, Administrative & Civil Law Division, ATTN: ADA-LA, Charlottesville, VA 22901. Remember to identify the title of the tape requested.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Legal Clerk/Court Reporter Training

The duties of legal clerks in staff judge advocate offices are greatly different from those in Trial Defense Service offices. It is important that all legal clerks and court reporters are trained to do assigned tasks in each office so that in emergencies the office can function without loss of support or mission interference. The lament often heard is that time never seems to exist for such training. The workload, it is said, just won't allow the legal clerks to exchange duties for any period. Not so! Personnel losses due to reassignments, emergency or ordinary leaves, and illnesses are daily occurrences in military life. Learning to do other assigned tasks will prepare each legal clerk or court reporter to compete with his or her contemporaries for promotions or awards. Cross-training generates greater self-confidence and pride and insures uninterrupted support to each office. Learning other tasks also inspires an individual to be more productive. For an office to operate efficiently, we must take the time to train our legal clerks and court reporters so they can fill any position that becomes vacant. Training must be continuous, relevant, well-planned, and performance-oriented.

2. Advance Noncommissioned Officer Course

In the future, individuals selected for the Advanced Noncommissioned Officer Course (ANCOC) at the Soldier Support Center Fort Benjamin Harrison, Indiana, will experience a new, performance-oriented curriculum. This is the result of an analysis and survey conducted worldwide during FYs 80 and 81. All instruction and evaluations in the course will henceforth be performance-oriented. A case study approach will be used with practical application of skills emphasized. A primary objective of the course will be to train noncommissioned officers to be trainers of their subordinates. The Platoon Trainers Workshop from the Battalion Training Management System will be implemented using materials developed by the Army Training Board.

A comprehensive combat survival phase will be conducted in a field environment. This phase has been designed to enable level-3 noncommissioned officers in an *Administrative MOS* (71D & 71E) to effectively perform skill level-4 tasks in the areas of land navigation, platoon defensive operations, and nuclear, biological, and chemical warfare.

An effective communications block of instruction has been developed which includes effective writing, techniques for military briefings, and an introduction to interpersonal communication.

The final subject area of the common ANOCC "CORE" will be leadership and management. Included will be such topics as teamwork, goal setting, performance objectives, performance counseling, time management, and the leadership styles, duties, responsibilities, and authority of the noncommissioned officer.

Upon completion of the five-week common "CORE", all legal clerks and court reporters will attend a one-week technical track given by The Judge Advocate General's School.

3. Promotions

For the month of September 1982, the cutoff score

for promotion from E-5 to E-6 (MOS 71D) was 686 for the primary zone and 846 for the secondary zone. Eighty-nine individuals were promoted.

For 71E court reporters, the cutoff score remained at 945 for both primary and secondary zones. No promotions were made.

4. Army Regulation 600-200

Interim Change I10 to AR 600-200 changes the selection process to provide that promotions from E-7 to E-8 and from E-6 to E-7 will be by MOS rather than by career management field. Criteria for promotion from E-8 to E-9 will remain the same. Selection will be made by career management field.

5. SQT

Preliminary reports indicate that 71Ds scored very high on the 1982 SQT.

6. Warrant Officer Application For 713A Legal Administrative Technician

Change 13 to AR 135-100, effective 1 September 1982, states that Army active duty personnel will submit applications through their unit and intermediate commanders to the commander having custody of their personnel records. This commander will forward the applications through the installation commander, directly to HQDA (DAJA-PTW), WASH D.C. 20310.

CLE News

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative yearly indices are provided users. TJAGSA publications may be identified for ordering purposes through these. Also, recently published titles and the identification numbers necessary to order them will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B063185	Criminal Law, Procedure, Pretrial Process/ JAGS-ADC-81-1
AD B063186	Criminal Law, Procedure, Trial/JAGS-ADC-81-2
AD B063187	Criminal Law, Procedure, Posttrial/JAGS-ADC-81-3

AD NUMBER	*TITLE*
AD B063188	Criminal Law, Crimes & Defenses/JAGS-ADC-81-4
AD B063189	Criminal Law, Evidence/ JAGS-ADC-81-5
AD B063190	Criminal Law, Constitutional Evidence/JAGS-ADC-81-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6386; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

December 6-17: 94th Contract Attorneys (5F-F10).

January 6-8: Army National Guard Mobilization Legal Planning Course.

January 10-14: 1983 Contract Law Symposium (5F-F11).

January 10-14: 4th Administrative Law for Military Installations (Phase I) (5F-F24).

January 17-21: 4th Administrative Law for Military Installations (Phase II) (5F-F24).

January 17-21: 69th Senior Officer Legal Orientation (5F-F1).

January 24-28: 23d Federal Labor Relations (5F-F22).

January 24-April 1: 100th Basic Course (5-27-C20).

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11-15: 70th Senior Officer Legal Orientation (5F-F1).

April 18-20: 5th Contract Attorneys Workshop (5F-F15).

April 25-29: 13th Staff Judge Advocate (5F-F52).

May 2-6: 5th Administrative Law of Military Installations (Phase I) (5F-F24).

May 9-13: 5th Administrative Law for Military Installations (Phase II) (5F-F24).

May 10-13: 16th Fiscal Law (5F-F12).

May 16-June 3: 26th Military Judge (5F-F33).

May 16-27: 96th Contract Attorneys (5F-F10).

May 16-20: 12th Methods of Instruction.

June 6-10: 71st Senior Officer Legal Orientation (5F-F1).

June 13-17: Claims Training Seminar (U.S. Army Claims Service).

June 20-July 1: JAGSO Team Training.

June 20-July 1: BOAC: Phase II.

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 13-15: Chief Legal Clerk Workshop.

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 97th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 15-May 19, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

4. Civilian Sponsored CLE Courses

February

4: GICLE, Real Estate Practice & Procedure, Macon, GA.

4-5: GICLE, Trial Evidence, Savannah, GA.

10: MCLNEL, Financing the Growing Business, Boston, MA.

11: OLCI, Federal Taxation Conference, Dayton, OH.

11: GICLE, Real Estate Practice & Procedure, Atlanta, GA.

11-12: GICLE, Trial Evidence, Atlanta, GA.

12: MCLNEL, Advocacy, Boston, MA.

18: OLCI, Federal Taxation Conference, Canton, OH.

18-19: GICLE, Estate Planning Institute, Athens, GA.

18-19: GICLE, Family Law, Macon, GA.

21-25, ALIABA, Basic Estate & Gift Taxation, Scottsdale, AZ.

24-27: ATLA, Developing the Case, Miami Beach, FL.

25: OLCI, Federal Taxation Conference, Columbus, OH.

25-26: GICLE, Family Law, Savannah, GA.

25-26: KCLE, Securities Law, Lexington, KY.

26: MCLNEL, Will & Trust Drafting, Cambridge, MA.

For further information on civilian courses, please contact the institution offering the course, as listed below. Commencing with the January 1983 issue of *The Army Lawyer*, the addresses of these organizations will be listed quarterly.

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone (202) 965-3500.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MICLE: Institute of Continuing Legal Education, University of Michigan Hutchins Hall, Ann Arbor, MI 48109.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-2977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012.

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations, Pamphlets, etc.

Number	*Title*		*Change Date*
AR 27-10	Military Justice		1 Sep 82
AR 27-20	Claims	901	3 Sep 82
AR 60-20	Operating Policies	901	21 Sep 82
AR 135-5	Army Reserve Forces Policy Committee	901	17 Aug 82
AR 135-5	Army Reserve Forces Policy Committee		1 Sep 82
AR 135-91	Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedure	9	1 Oct 82
AR 135-100	Appointment of Commissioned and Warrant Officers of the Army	13	1 Sep 82
AR 135-178	Separation of Enlisted Personnel	903	30 Jul 82
AR 135-180	Qualifying Service for Retired Pay Nonregular Service	5	1 Oct 82
AR 140-158	Enlisted Personnel Classification, Promotion, and Reduction	9	1 Sep 82
AR 340-17	Release of Information and Records From Army Files		1 Oct 82
AR 360-5	Public Information	1	15 Sep 82
AR 500-70	Military Support of Civil Defense		1 Oct 82
AR 600-20	Army Command Policy and Procedures	901	15 Sep 82
AR 600-29	Fund Raising Within the Department of the Army	901	12 Aug 82
AR 635-200	Enlisted Separations	908	3 Sep 82
AR 635-200	Enlisted Personnel		1 Oct 82
DA Pam 310-1	Index of Administrative Publications		1 Aug 82
DA Pam 550-157	Nigeria; A Country Study		1982

2. Articles

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Spector & Foster, *Rule 412 and the* Doe *Case: The Fourth Circuit Turns Back the Clock*, 35 Okla. L. Rev. 87 (1982).

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Note, *High Seas Narcotic Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 Fordham L. Rev. 688 (1982).

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:
ROBERT M. JOYCE
Major General, United States Army
The Adjutant General

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